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THE DIRKSEN AMENDMENT AND THE ARTICLE V CONVENTION PROCESS

Arthur Earl Bonfield*

THE PROBLEM

ON March 18, 1967, the *New York Times* announced that "[a] campaign for a constitutional convention to modify the Supreme Court's 'one man-one vote' rule is nearing success. It would be the first such Convention since the Constitution was drafted in Philadelphia in 1787."¹ The newspaper report went on to note that as of that date, thirty-two states had formally requested Congress to convene a federal constitutional convention for the purpose of proposing amendments to our fundamental law on the subject of state legislative apportionment. Since article V of the United States Constitution provides that "on the Application of the Legislatures of two-thirds of the several states [Congress] shall call a Convention for proposing amendments," the article concluded that the proponents of the convention "lack only two states in their drive" to assemble such a body.

The target of this convention drive is the decision of the United States Supreme Court in *Reynolds v. Sims*² which held "that, as a basic constitutional standard, the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis."³ Forces led by Senator Everett Dirksen hope to amend the Constitution so that the several states can apportion one house of their bicameral legislatures on some basis other than population. After an attempt to induce Congress to propose such an amendment failed for want of the requisite two-thirds vote, Senator Dirksen, bolstered by earlier similar efforts of the Council of State Governments,⁴ concentrated his efforts on the convention approach to proposing constitutional amendments.⁵ As the *New York Times* story of March 18 stated, "[m]ost of official Wash-

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1. Graham, *Efforts To Amend The Constitution On Districts Gain*, N.Y. Times, March 18, 1967, at 1, col. 6.

2. 377 U.S. 533 (1964).

3. *Id.* at 568.

4. *Amending the Constitution To Strengthen the States in the Federal System*, 36 STATE GOV'T 10 (1963). See Oberst, *The Genesis of the Three States-Rights Amendments of 1963*, 39 NOTRE DAME LAW. 644 (1964).

5. Graham, *supra* note 1.

ington [was] caught by surprise because the state legislative actions [in attempting to summon a convention for this purpose] have been taken with little fanfare."

Within a week of this revelation congressional forces favoring the reapportionment decisions reacted, especially "to Senator . . . Dirksen's assertion . . . that two more legislatures would soon pass similar [convention call] resolutions, thus confronting Congress with the required 34."⁶ Senator Joseph Tydings, in a speech to the United States Senate, suggested that the effort to convene a constitutional convention as a means of proposing the Dirksen legislative apportionment amendment should not succeed.⁷ He asserted that even if two more states joined the thirty-two that had recently requested such a convention, Congress could not properly call one, because the tendered applications of those states were improper. Senator Dirksen disagrees.⁸ Since no additional state legislatures have tendered resolutions requesting such a convention, Congress has not yet been forced to resolve the many legal issues involved. It may, however, have to do so in the near future. With this in mind, Senator Sam Ervin recently introduced a bill into the Congress which would "provide procedures for calling constitutional conventions for proposing amendments to the Constitution of the United States."⁹

This article will concentrate on the legal issues facing Congress in the current effort to call a constitutional convention. Because all of the previous amendments to the Constitution were proposed to the states by a two-thirds vote of both Houses of Congress, the issues raised in the present situation have never been resolved. The appropriate course of action for the national legislature is especially in doubt. An attempt will therefore be made here to focus on proper decision-making by Congress in resolving these constitutional issues. The role of the judiciary will be considered only incidentally, since, as will be seen, the *primary* obligation to decide questions raised in the amending process rests with Congress. It is also possible that the *final* dispositive power on this subject rests effectively in Congress because the courts may consider all or most of the issues raised in the amending process nonjusticiable political questions.¹⁰ Neverthe-

6. Graham, *Amendment Drive Meets Challenge*, N.Y. Times, March 23, 1967, at 19, col. 4.

7. 113 CONG. REC. S.4231-43 (daily ed. March 22, 1967).

8. 113 CONG. REC. S.5460-65 (daily ed. April 19, 1967).

9. S. 2307 90th Cong., 1st Sess. (1967). Hearings were subsequently held on this bill.

10. See *Coleman v. Miller*, 307 U.S. 433, 457 (1939) (concurring opinion); Dowling, *Clarifying the Amending Process*, 1 WASH. & LEE L. REV. 215 (1940). On the justiciability of questions arising in the amending process, see generally C. BRICKFIELD, STAFF

less, "in the exercise of that power, Congress . . . is [still] governed by the Constitution."¹¹ The following discussion of constitutional principles should, therefore, be considered as an appropriate guide for consideration by Congress when that body undertakes to perform its obligations respecting an article V convention.¹²

I. THE APPLICATIONS BY THE STATES

A. *Article V Applications as Prerequisites for a Convention Call*

Congress is neither authorized nor compelled to summon an article V convention prior to the submission by two-thirds of the state legislatures of proper and timely applications for such a convention. The reasons for this are several. Since the United States is a government of delegated powers, it possesses no authority except that conferred upon it by the Constitution. Article V, the only provision in the Constitution dealing with its amendment, must therefore be deemed exhaustive and not merely illustrative of the federal government's powers in this regard. That provision explicitly sets out two modes for proposing constitutional amendments, only one of which contemplates the convening of a convention empowered to propose amendments. Such a "Convention" is authorized by article V only when two-thirds of the state legislatures have made "Applications" for a convention. As a result, applications within the meaning of article V from two-thirds of the state legislatures must fairly be deemed absolute prerequisites to the summoning of such a body.¹³

OF HOUSE COMM. ON THE JUDICIARY, 85TH CONG., 1ST SESS., PROBLEMS RELATING TO A FEDERAL CONSTITUTIONAL CONVENTION 27-28, 40-43 (Comm. Print 1957); L. ORFIELD, AMENDING THE FEDERAL CONSTITUTION 7-36 (1942); Clark, *The Supreme Court and the Amending Process*, 39 VA. L. REV. 621 (1953); Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L.J. 517, 587-89 (1966); Note, *Proposing Amendments to the United States Constitution by Convention*, 70 HARV. L. REV. 1067 (1957).

11. *Coleman v. Miller*, 307 U.S. 433, 457 (1939).

12. U.S. CONST. art. V provides:

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress.

13. See ORFIELD, *supra* note 10, at 40; Black, *The Proposed Amendment of Article V: A Threatened Disaster*, 72 YALE L.J. 957, 962-64 (1963); Corwin & Ramsey, *The Constitutional Law of Constitutional Amendment*, 26 NOTRE DAME LAW. 185, 196 (1951). An analogy is to be found in those state constitutions which require a specific

If these applications were not prerequisites, a majority of Congress, on its own say-so, could validly summon such a body and determine its make-up and mode of operation.¹⁴ Thus, it could provide that the convention be able to propose amendments to the states by a mere majority of its delegates. But article V insists that a two-thirds vote be required by both houses of Congress, or that two-thirds of the state legislatures make application for a convention, before an amendment to the Constitution may be proposed to the states. This reflects the conviction of the Founding Fathers that the seriousness of this kind of action demands a national consensus. Permitting a simple majority of Congress to call a convention empowered to propose constitutional amendments approved by a simple majority of delegates would, therefore, frustrate the well-reasoned intentions of the Constitution's drafters: the particularly high degree of consensus contemplated would no longer be required at any point to trigger the amending process.

Another reason supports the view that valid article V applications are an absolute precondition to a convention call: "[A] high degree of adherence to exact form . . . is desirable in this ultimate legitimating process."¹⁵ Because of the uniquely fundamental nature of a constitutional amendment, attempts to alter our Constitution should not be filled with questionable procedures which could reasonably cast doubt on the ultimate validity of the provision produced. The procedure followed in any effort to amend the Constitution should be so perfect that it renders unequivocal to all reasonable men the binding nature of the product. Consequently, there must be a firm and unyielding adherence to the precise procedures of article V. This unusual need for certainty in amending our fundamental law also lends additional force to the assumption that the precise procedures provided in article V must be deemed exclusive.

B. *Sufficiency of the State Resolutions: Their Form*

The current applications for a convention must, therefore, be carefully scrutinized in order to determine their adequacy for pur-

mandate at the polls before the legislature can call a state constitutional convention. See IOWA CONST. art. X, § 3; NEV. CONST. art. XVI, § 2; N.Y. CONST. art. XIX, § 1; S.D. CONST. art. XXIII, § 2; TENN. CONST. art. XI, § 3.

14. The terms of article V in no way suggest that Congress may not convene such a body by the usual vote required for congressional action. Consequently, no more than a majority vote would seem to be required to "call a Convention" or to establish its procedures. See Forkosch, *The Alternative Amending Clause in Article V: Reflections and Suggestions*, 51 MINN. L. REV. 1053, 1067 (1967).

15. Black, *supra* note 13, at 963.

poses of article V. If the state legislative resolutions are not applications for a convention within the meaning of article V, Congress would neither be authorized nor obligated to call a convention pursuant thereto.

Twenty-nine of the thirty-two resolutions requesting a federal constitutional convention are identical, or nearly so, as to the nature of the convention they seek from Congress. Their language follows the model application sponsored by the Council of State Governments and in almost every case provides "that this Legislature respectfully petitions the Congress of the United States to call a convention for the purpose of proposing the following article [set out below] as an amendment to the Constitution of the United States."¹⁶ The three other states adopted resolutions which apply for a convention in order to propose to the states an amendment, the text of which is not stipulated, that would obtain a specified result.¹⁷ In the initial version of his bill, Senator Ervin seemed to believe that both of these kinds of applications are proper for article V purposes. Thus, he took the view that the states may petition for a convention solely to propose or refrain from proposing specific preselected amendments to the Constitution. The original bill provided that a state application would be sufficient if it petitioned "the Congress stating, in substance, that the legislature requests the calling of a convention for the purpose of proposing one or more amendments [of a particular nature] to the Constitution of the United States and stating the [specific] nature of the amendment or amendments to be proposed."¹⁸ The bill now proposed by Senator Ervin deletes the bracketed language. It may be hoped that these deletions indicate an awareness that, as will hereafter be demonstrated, the current applications do not qualify under article V.

The amending article of the Constitution clearly specifies that Congress "shall call a Convention for proposing Amendments." The process of *proposing* amendments would seem to contemplate a conscious weighing and evaluation of various alternative solutions to the

16. *Amending the Constitution To Strengthen the States in the Federal System*, *supra* note 4, at 11-14. See also 113 CONG. REC. S.4232-33 (daily ed. March 22, 1967); AMERICAN ENTERPRISE INSTITUTE, SPECIAL ANALYSIS, A CONVENTION TO AMEND THE CONSTITUTION? 11-16 (1967); E. YADLOSKY, STATE PETITIONS AND MEMORIALS TO CONGRESS ON THE SUBJECT OF STATE LEGISLATURES, LIBRARY OF CONGRESS LEGISLATIVE REFERENCE SERVICE REPORT JK140C32/205R (to Aug. 5, 1965).

17. AMERICAN ENTERPRISE INSTITUTE, *supra* note 16, at 12, 16.

18. S. 2307, 90th Cong., 1st Sess. § 2 (1967) (original bill); for the amended version of S. 2307, see appx. to Senator Ervin's article in this symposium, 66 MICH. L. REV. 896 (1968) [hereinafter cited as amended bill, Ervin appx.].

problems perceived. In this connection the following should be noted:

The process of "proposal" by Congress, contained in the *first* alternative of Article V, obviously [and necessarily] includes the process of plenary deliberation upon the whole problem to which the amendment is to address itself. It entails choice among the whole range of alternatives as to substance and wording. It is "proposal" in the most fully substantial sense, where the proposer controls and works out the content and form of the proposition. It is very doubtful whether the same word two lines later, in the description of the *second* alternative, ought to be taken to denote a mechanical take-it-or-leave-it process.¹⁹

There is a sound basis for the suggestion that article V contemplates a deliberative convention that would itself undertake to evaluate fully a problem and propose those particular solutions that it deems desirable. Amendments to our national Constitution are chiefly matters of national concern. Consequently, all the alternatives should be carefully explored and debated on a national level, and the details of any proposed amendments fully worked out on a national level, before they are sent to the states for the more locally oriented ratification procedure. It can reasonably be assumed that the two modes provided for "proposing" amendments found in article V were to be symmetrical in this regard. Whether "proposed" by Congress or a convention, the subject matter of any suggested amendment should be "considered as a *problem*, with [an evaluation of] a wide range of possible solutions and an opportunity to raise and discuss them all in a body with national responsibility and adequately flexible power."²⁰ The "Convention" contemplated by article V was, therefore, to be a fully deliberative body—with power to propose to the states as amendments any solutions to the problem submitted to it that *it* deemed best.

If this be so, the resolutions under consideration should be deemed insufficient applications within the meaning of article V and should not empower Congress to call a convention. Instead of requesting such a deliberative convention, these resolutions demand "a convention for the purpose of proposing *the following article* as an amendment to the Constitution of the United States."²¹ This

19. Black, *supra* note 13, at 962 (emphasis in original).

20. *Id.* at 963. Brickfield disagrees. He notes that "State legislatures can limit a convention to the consideration of *specific* amendments." BRICKFIELD, *supra* note 10, at 25 (emphasis added).

21. See text accompanying note 16 *supra*.

is, in effect, a call for a convention empowered solely to approve or disapprove in a mechanical way the text of specific amendments that have already been "proposed"—that is, deliberated—elsewhere. In a sense, this would seek to make the convention part of the *ratifying* process, rather than part of the deliberative process for proposing constitutional amendments.²² These resolutions, then, are materially defective for purposes of article V because of their failure to request an article V convention.²³ Lest this construction of article V be deemed too confining, it should be pointed out that were the states to demand the kind of fully deliberative convention contemplated by the Constitution, this would not preclude their submission of specific proposals to that body for its consideration.

Furthermore, Congress has no authority to treat these resolutions as applications for the kind of convention article V does contemplate. It cannot be realistically inferred from these resolutions that the state legislatures tendering them would be satisfied or willing to have a plenary convention consider the problems at which these amendments were directed and submit to the states the solutions to those problems that *the convention* deemed best. Would they be willing to have a plenary and unfettered convention consider how much authority state legislatures should have over their apportionment? Even if such a convention might propose that the "one man-one vote" principle be stringently applied and expressly written into the federal Constitution? "It is not for Congress to guess whether a state which asks for one kind of 'convention' wants the other as a second choice. Altogether different political considerations might govern."²⁴

Senator Dirksen, however, notes that the Constitution is silent as to the form of the application for a convention. "Since State legislatures must initiate [applications], under article V . . . [their form] is a matter for them to determine. All that is needed, by a rule of reason, is a clear expression of intent by the legislatures. So what difference does it make in what form the application for a convention is made?"²⁵ The distinguished Senator is undoubtedly correct. However, the propriety of his conclusion that the current applica-

22. Shanahan, *Proposed Constitutional Amendments: They Will Strengthen Federal-State Relations*, 49 A.B.A.J. 631, 633 (1963). He specifically notes that the purpose of including the actual text amendments was to insure that the "applicants" for a convention retained control over the amendments ultimately proposed.

23. See 113 CONG. REC. S.5455 (daily ed. April 19, 1967) (remarks of Senator R. Kennedy to the same effect).

24. Black, *supra* note 13, at 964.

25. 113 CONG. REC. S.5463 (daily ed. April 19, 1967) (remarks of Senator Dirksen).

tions are therefore legally sufficient to trigger the convention process is dependent upon the *nature* of the legislative intent we are looking for. The present resolutions are inadequate precisely because the clear intent of the state legislatures in requesting a nondeliberative convention is the wrong intent for article V purposes. Surely Senator Dirksen is not suggesting that, in the face of the clear and unambiguous language of the resolutions demanding a convention simply to approve or disapprove a preselected specific amendment, Congress could properly find a request for a fully deliberative convention which would consider the general problem as a whole and propose *its own independent* solution to the states.²⁶ If he is, the Senator seems to be ignoring the long tradition of honoring, in the absence of linguistic ambiguities, the plain meaning of a statute's language.²⁷ Even the legislative history—usually resorted to only as a means of resolving ambiguities on the face of a statute and not to impeach those things clearly settled by its language²⁸—is directly in opposition to any assumption that the creators of these state resolutions were requesting a deliberative convention of the type contemplated by article V.²⁹

Most of the state resolutions contain another defect which may preclude their characterization as valid article V applications. Those which follow the format sponsored by the Council of State Governments specify that the amendment is to be ratified by the state legislatures.³⁰ But article V clearly indicates that regardless of the mode of an amendment's proposal, Congress is to decide whether it shall be ratified by three-fourths of the state legislatures or three-fourths of the special ratifying conventions held in each state.³¹ Arguably, then, these resolutions may also be insufficient as article V applications because they achieve an illegitimate end: they seek to prevent Congress from exercising its constitutionally-based discre-

26. It has been suggested that a state application for a convention requesting a specific amendment can be counted as a valid application, although the petition's request for a specific amendment would have no binding effect on the convention. See Wheeler, *Is a Constitutional Convention Impending?*, 21 ILL. L. REV. 782, 795 (1927). See also AMERICAN ENTERPRISE INSTITUTE, *supra* note 16, at 22.

27. See, e.g., *Thompson v. Siratt*, 95 F.2d 214 (8th Cir. 1938); *Equitable Life Assurance Soc'y v. Bowers*, 87 F.2d 687 (2d Cir. 1937); *Hutton v. Phillips*, 70 A.2d 15 (Del. Super. 1949); 2 J. SUTHERLAND, STATUTORY CONSTRUCTION 316, 334-36 (3d ed. 1943).

28. See authorities cited in note 27 *supra*.

29. See Oberst, *supra* note 4; Shanahan, *supra* note 22.

30. *Amending the Constitution To Strengthen the States in the Federal System*, *supra* note 4, at 11-14; Yadlosky, *supra* note 16.

31. *United States v. Sprague*, 282 U.S. 716 (1931).

tion to choose the mode of ratification of proposed constitutional amendments.

C. *The Role of State Governors in the Application Process*

The Council of State Governments specified that the application it sponsored "should be in whatever technical form the state employs for a single resolution of both houses of the legislature which does not require the Governor to approve or veto."³² Applications sponsored by Senator Dirksen have taken the same approach. The propriety of this view depends upon whether the term "legislature" in the application provision of article V means the whole legislative process of the state—as defined in the state constitution—or only its representative lawmaking body.

*Hawke v. Smith, No. 1*³³ interpreted "legislatures" in the ratification clause of article V to mean the representative lawmaking body only, since "ratification by a State of a constitutional amendment is not an act of legislation within the proper sense of the word."³⁴ If the term "legislature" is so interpreted in the ratification clause of article V, no valid reason appears why it should not bear the same meaning in the application clauses of that provision.

Additional support for the view that the governor of a state need not sign its application for an article V convention can be gleaned from the case of *Hollingsworth v. Virginia*.³⁵ It was argued in that case that the eleventh amendment was invalid because, after it had been approved for proposal to the states by a two-thirds vote of Congress, it had not been tendered to the President for his signature and thus was never properly submitted to the states for their ratification. Justice Chase answered that "the negative of the President applies only to the ordinary cases of legislation; he has nothing to do with the proposition or adoption of amendments to the Constitu-

32. *Amending the Constitution To Strengthen the States in the Federal System*, *supra* note 4, at 11.

33. 253 U.S. 221 (1920). That case held that a state could not restrict the ratifying power of its legislature by providing for a binding popular referendum on the question.

34. *Id.* at 229. As a result, the Court held that a state constitutional provision that provided for a referendum on the action of the General Assembly in ratifying any proposed amendment to the United States Constitution was in conflict with article V. *Contra, State ex rel. Mullen v. Howell*, 107 Wash. 167, 181 P. 920 (1919). An approach similar to that of *Hawke v. Smith, No. 1* has been taken by state courts with regard to state constitutional amendments. See *Mitchell v. Hopper*, 153 Ark. 515, 241 S.W. 10 (1922); *Larkin v. Gronna*, 69 N.D. 234, 285 N.W. 59 (1939).

35. 3 U.S. (3 Dall.) 378 (1798).

tion."³⁶ It is not difficult to apply this reasoning to the powers of state governors and conclude similarly that the executive of the state has no function to perform in the article V application process. This is the position of the Ervin Bill.³⁷

It can also be argued that when state legislatures petition Congress for an article V convention they act not as lawmakers under their state constitution but rather as agents of the federal government performing a federal function. That is, they are acting as "representatives of the people of the State under the power granted by article V. The article therefore imports a function different from that of lawmaker and renders inapplicable the conditions which usually attach to the making of State laws."³⁸ The governor's approval of an application for a convention is thus unnecessary and his veto may be disregarded. Effective applications for an article V convention need only be approved by a state's legislature.³⁹ In this respect, the underlying theory upon which the applications sponsored by Senator Dirksen and the Council of State Governments are based is correct.

D. *Timing of the Applications for a Convention*

A question has been raised as to whether the thirty-two applications for a convention are "sufficiently contemporaneous to be treated as a valid reflection of the will of the people at any one time."⁴⁰ Congress is neither empowered nor under a duty to call an article V convention unless it receives "relatively contemporaneously," proper applications from the required number of state legislatures. The reason for this is that each step in the amending process is meant to demonstrate significant agreement among the people of this country—at one time—that changes in some particular part or the whole of

36. *Id.* at 381. "The most reasonable view would seem to be that the signature of the chief executive of a State is no more essential to complete the action of the legislature upon an amendment to the Federal Constitution than is that of the President of the United States to complete the action of Congress in proposing such an amendment." H. AMES, *THE PROPOSED AMENDMENTS TO THE CONSTITUTION OF THE U.S. DURING THE FIRST CENTURY OF ITS HISTORY*, H.R. Doc. No. 353, pt. 2, 54th Cong., 2d Sess., 298 (1897).

37. S. 2307, 90th Cong., 1st Sess. § 3(a) (1967) (amended bill); Ervin appx., 66 MICH. L. REV. 896 (1968).

38. BRICKFIELD, *supra* note 10, at 10-11.

39. See STAFF OF HOUSE COMM. ON THE JUDICIARY, 82D CONG., 2D SESS., *PROBLEMS RELATING TO THE STATE APPLICATION FOR A CONVENTION TO PROPOSE CONSTITUTIONAL LIMITATIONS ON FEDERAL TAX RATES* 7-8 (Comm. Print 1952); Note, *supra* note 10, at 1075.

40. 113 CONG. REC. S.5455 (daily ed. April 19, 1967) (remarks of Senator R. Kennedy).

our fundamental law are desirable. Nothing less would seem acceptable in a process of such significance and lasting impact.

Analogous cases accord with this reasoning. In *Dillon v. Gloss*⁴¹ the Supreme Court sustained the power of Congress to fix the time period during which ratification of a pending amendment could be effective. Noting that article V is silent on this question, the Court asked: "What then is the reasonable inference or implication? Is it that ratification may be had at any time, as within a few years, a century or even a longer period; or that it must be had within some reasonable period which Congress is left free to define?"⁴² After admitting that neither the debates in the Convention of 1787 nor those in the state ratifying conventions shed any light on this question, the Court concluded that "the fair inference or implication from Article V is that the ratification must be within some reasonable time after proposal, which Congress is free to fix."⁴³ The Court's rationale was

[A]s ratification is but the expression of the approbation of the people and is to be effective when had in three-fourths of the States, there is a fair implication that it must be sufficiently contemporaneous in that number of States to reflect the will of the people in all sections at relatively the same period, which of course ratification scattered through a long series of years would not do.⁴⁴

This logic would seem equally compelling in regard to the process of proposing amendments. Article V is silent as to how long applications for a convention are to retain their vitality. But here too it seems that to exhibit any significant or meaningful agreement as to the desirability of such a convention, applications from two-thirds of the states must be "sufficiently contemporaneous . . . to reflect the will of the people in . . . [different] sections at relatively the same period." In other words, "[t]o be obligatory upon Congress, the applications of the states should be reasonably contemporaneous with one another, for only then would they be persuasive of a real consensus of opinion throughout the nation for holding a convention"⁴⁵

While *Dillon v. Gloss*⁴⁶ seems to establish the authority of Con-

41. 256 U.S. 368 (1921).

42. *Id.* at 371.

43. *Id.* at 375.

44. *Id.*

45. Corwin & Ramsey, *supra* note 13, at 195-96. See also AMERICAN ENTERPRISE INSTITUTE, *supra* note 16, at 24; BRICKFIELD, *supra* note 10, at 38-39.

46. 256 U.S. 368 (1921).

gress to fix reasonable time limitations it does not solve the problem of what should be considered sufficient contemporaneity in the absence of such a prior stipulation. How, then, should Congress determine whether tendered applications are sufficiently contemporaneous to be counted together? When do applications become stale? "Is the 90th Congress required to recognize resolutions set to the 89th Congress? Are state resolutions passed more than two years ago . . . still valid?"⁴⁷

It has been suggested that the current Congress might only consider those applications submitted during its tenure.⁴⁸ That is, in order to ascertain whether it is empowered or under an obligation to call an article V convention, each Congress need only look to those applications tendered during its life. The Ninetieth Congress need not consider any applications tendered during the Eighty-ninth Congress, since the life of an application is only as long as the particular Congress to which it is tendered. This standard of contemporaneity seems unacceptable for a variety of reasons. In the first place, ten applications tendered the last day of one Congress, and thirty submitted the first day of the following one would be insufficient even though they may have been submitted only three months apart. Additionally, it should be recalled that the state legislatures do not address their applications to any specific Congress.

Another suggestion has been that only those applications tendered within the present generation be counted with each other; that is, that the effective life of an application not exceed a generation.⁴⁹ It may be noted that no measure of the precise length of a generation is provided. Nor is any satisfactory rationale offered to justify Congress' counting applications together that have been tendered over such an appreciable time period. Furthermore, convention calls made as long ago as twenty-five or thirty years, if that be a generation,⁵⁰ have no realistic relation to the present wishes of the current body politic.

Congress might determine the effective life of an application by engaging in an in-depth analysis of the application itself and all

47. 113 CONG. REC. S.5029 (daily ed. April 13, 1967) (remarks of Senator Javits).

48. Sprague, *Shall We Have a Federal Constitutional Convention, and What Shall It Do?*, 3 MAINE L. REV. 115, 123 (1910). The author admits that as a practical matter such a requirement of contemporaneity would render the application process incapable of fulfillment.

49. ORFIELD, *supra* note 10, at 42.

50. "Generation" is defined as "the term of years, roughly 30 among human beings, accepted as the average period between the birth of parents and the birth of their offspring." RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 590 (1966).

surrounding circumstances. Precedent for this flexible approach to timeliness exists in the ratification process. In determining what is a reasonable time for ratification of a proposed amendment, the courts have stressed the continuing responsiveness of the proposal to the public will. "[A]n alteration of the Constitution proposed today has relation to the sentiment and the felt needs of today, and . . . if not ratified while that sentiment may fairly be supposed to exist, it ought to be regarded as waived, and not again to be voted upon, unless a second time proposed by Congress."⁵¹ Consequently, an amendment's ratification has been considered timely only when a full analysis of the situation would show that the proposal is not stale. For example, in *Coleman v. Miller* the Court noted:

When a proposed amendment springs from a conception of economic needs, it would be necessary . . . to consider the economic conditions prevailing in the country, [and] whether these had so far changed since the submission as to make the proposal no longer responsive to the conception which inspired it [This question] can be decided by the Congress with the full knowledge and appreciation ascribed to the national legislature of the political, social and economic conditions which have prevailed during the period since the submission of the amendment.⁵²

If this approach were to be utilized in determining the effective life of an application, Congress would have to decide, after examination of all the facts, whether the particular application still "has relation to the sentiment and felt needs of today."⁵³ Among the factors that might be considered are the political tenor of the times, then and now; intervening or changing circumstances relevant to the subject matter of the application since its filing; the transitory or long-term nature of the problem to which the application for a convention addresses itself; whether the problem is still considered grave by most Americans; and so on. The obvious difficulty with this approach is that it requires Congress to make a determination based on many variables that are unusually difficult, if not impossible, for even that politically oriented body to evaluate properly and fairly. However, it can be done.

Applying this approach to the current situation, Senators Tydings and Robert Kennedy make a very persuasive argument for

51. *Dillon v. Gloss*, 256 U.S. 368, 375 (1921) [quoting J. JAMESON, CONSTITUTIONAL CONVENTIONS § 585 (4th ed. 1887)].

52. *Coleman v. Miller*, 307 U.S. 433, 453-54 (1939).

53. *Dillon v. Gloss*, 256 U.S. 368, 375 (1921) [quoting J. JAMESON, CONSTITUTIONAL CONVENTIONS § 585 (4th ed. 1887)].

presently ignoring, on grounds of staleness, most of the state applications. They suggest that:

Congress must determine when the identical acts of various States will cease to be collectively responsive to a continuing public interest. In this particular case, over two-thirds of the [thirty-two] enacting legislatures were faced with reapportionment at the time they acted and most of these legislatures have since changed in composition and outlook.⁵⁴

[T]he reapportionment of State legislatures which had submitted petitions to avoid such reapportionment is a political and social condition which has "so far changed since the submission—of the petitions—as to make the proposal no longer responsive to the conception which inspired it." . . . It is not the lapse of time, but rather the lapse of the malapportioned legislatures themselves which clearly indicated that the same "sentiment" in the newly apportioned legislatures may not "fairly be supposed to exist." These petitions, therefore, "ought to be regarded as waived, and not again to be voted upon, unless a second time proposed" by a constitutionally apportioned State legislature.⁵⁵

This analysis seems correct. The fact that a large number of the legislatures requesting an article V convention for this purpose were malapportioned at the time of their application and have subsequently been more equitably apportioned on the basis of population is the very kind of consideration that is relevant to the timeliness of such petitions according to the in-depth analysis approach. Reapportionment of these bodies on an exclusively population basis changes their composition and outlook on the subject of reapportionment and probably precludes the assumption—absent new evidence to the contrary—that they support the efforts of their predecessors to permit nonpopulation-based representation. Any application for an article V convention to propose the Dirksen amendment which was tendered to Congress by a state legislature which has subsequently been reapportioned on a more representative population basis should, therefore, be rejected as stale. It cannot fairly be deemed to reflect that state's current legislative sentiment. On this basis, fourteen to seventeen of the thirty-two applications under examination here should be entirely ignored.⁵⁶

54. 113 CONG. REC. S.5455 (daily ed. April 19, 1967) (remarks of Senator R. Kennedy).

55. 113 CONG. REC. S.5452 (daily ed. April 19, 1967) (remarks of Senator Tydings).

56. See 113 CONG. REC. S.5457-58 (daily ed. April 19, 1967) for a chart showing the number of legislatures that have been reapportioned since the submission of their applications for a convention. According to that chart, fourteen states had, as of that

Senator Dirksen rejects this and insists that none of the applications in question here are stale. He notes that "[t]he point has been made . . . that these applications are invalid, because they date back, in some instances, to 1963. I think the Supreme Court demolished that argument pretty well in connection with the 17th Amendment." The Senator points out that the Supreme Court held the seven-year time period set by Congress for the seventeenth amendment's ratification reasonable and proper. "If 7 years is reasonable for ratification, is 4 years an unreasonable time in which to initiate, by State application, a convention for the purpose of amending the same Constitution to which they have 7 years to approve an amendment? I submit that the rule of reason applies in every case."⁵⁷

The rule of reason may well apply but it also dictates, according to the *Coleman v. Miller* approach, a fair examination of *all* factors bearing on the continuing vitality of the several applications, including the highly relevant change in circumstances noted by Senators Tydings and Kennedy. Senator Dirksen's argument may only indicate that article V applications received within a period of seven years could normally be considered by Congress as contemporaneous for purposes of calling a convention. However, if there is direct and substantial evidence, as there is here, that relevant conditions have so changed during the seven-year period as clearly to suggest the probability that at least some of the applications tendered four or five years ago are stale—that is, unresponsive to the present wishes of the people's representatives—then Congress cannot properly count them.

It is possible to devise a simpler and perhaps more sensible approach to the question of reasonable contemporaneity and timeliness of applications than those already discussed. In counting applications for an article V convention, Congress should properly consider only those tendered in that period, prior to the most recent application, during which all of the state legislatures have had an opportunity to consider the question at a full regular session. That is, the maximum time between those applications that can be counted together should not exceed that period during which all state legislatures have met once for a full regular session. In no case could the time period involved exceed two and one-half years.⁵⁸

date, reapportioned their legislatures since filing an application for a convention on this subject. Several additional petitioning legislatures have since been reapportioned.

57. 113 CONG. REC. S.5463 (daily ed. April 19, 1967).

58. If legislature A made such an application at the very start of its session, say in

If this approach were used here, a large portion of the state resolutions seeking a convention to propose the Dirksen amendment would be considered stale and no longer effective.⁵⁹

The policy advantage of this approach to timeliness of applications seems evident. The burden should always be on those who invoke the convention process to demonstrate clearly, by sufficient contemporaneity of their applications, that there is a present agreement among two-thirds of the states as to the desirability of a constitutional convention. This consensus can be realistically demonstrated only by limiting the count of such applications to those made during the most recent period during which all state legislatures have had a reasonable opportunity to consider the question. Only applications filed during this period accurately represent the results of the most recent poll that could reasonably be taken on the subject.

There are other advantages to this approach. Once applications for a convention are filed, attempts to withdraw them are not likely to be strenuously pressed. This would be true even though the legislature had changed its mind—or would no longer make such an application as a *de novo* proposition.⁶⁰ The proposed approach would force reasonably frequent reconsideration of the desirability of such a convention in each state that had previously applied for one. Some assurance is thereby provided that such an extraordinary body will be convened only if applications from two-thirds of the states clearly demonstrate by the most recent, hence most reliable poll practicable, a present agreement on the subject.

This standard is neither unduly onerous, nor necessarily destructive of the application process. States generally will not act alone in such matters. Indeed, the Founding Fathers probably contemplated some concert of action in such attempts to obtain a convention. The

February 1967, it would remain valid until the end of the next full regular session of all the state legislatures. Since many states meet only once every other year, and one of those might make such an application at the end of its session, for example, as late as June or July 1969, a period of two and one-half years may elapse between the first and last applications that may be counted together.

59. Most of the states tendering applications on this subject did so in 1963 and 1965. See AMERICAN ENTERPRISE INSTITUTE, *supra* note 16, at 11-15; YADLOSKY, *supra* note 16. Those tendered during 1965 would have expired by this standard at the close of the 1967 state legislatures. Those tendered in 1963, of course, would have expired earlier. See note 58 *supra*.

60. But note that in a good number of cases, states have attempted to rescind applications for an article V convention that they had previously tendered. Graham, *The Role of the State in Proposing Constitutional Amendments*, 49 A.B.A.J. 1181-82 (app.) (1963).

present effort is an excellent example. Furthermore, once a state legislature tenders such an application it can continually renew that application in its subsequent sessions. If there really is substantial continuing agreement on the desirability of such a convention, debate on subsequent renewals of the state applications should be relatively perfunctory, and the renewals easy to obtain. Constitutionally speaking, therefore, the view of timeliness urged here seems sound and worthy of adoption by Congress.

However, despite the inferiority of such an approach, it should be noted that Congress may well treat the problem of contemporaneity in the application process in the same way it has treated that problem in the ratification process, since the situations are admittedly analogous.⁶¹ In four of the last seven amendments proposed by Congress, it specified that the states were to have up to seven years to ratify them.⁶² Our national legislature has also deemed all of the twenty-four amendments to the Constitution properly ratified within a time period it thought sufficiently short to demonstrate a contemporaneous agreement among the people in three-fourths of the states, despite the fact that one took four years from the date of its submission and another three and one-half years.⁶³

A test of contemporaneity as stringent as that suggested here has, then, previously been rejected by Congress in one portion of the amending process. However, in light of its express action in four of the last seven amendments it submitted to the states, Congress may be inclined to consider seven years the absolute maximum period allowable to demonstrate a "current" agreement among the people. If this is so, proponents of the apportionment amendment will have to secure the endorsement of proper resolutions by the legislatures of two-thirds of the states within that period. In this connection it should be noted that Senator Ervin's bill, which originally stated that an application "shall remain effective for six calendar years after the date it is received by the Congress," now has been amended to

61. It might be contended that applications for a convention need not be made contemporaneously to be effective because the calling of a convention empowered only to *propose* amendments is far less significant than ratification. But this notion should be rejected. All parts of the amending process are too important to demand anything less than the kind of contemporaneous agreement suggested here.

62. U.S. CONST. amends. XVIII, XX, XXI, XXII. *See also* *Dillon v. Gloss*, 256 U.S. 368 (1921).

63. *THE CONSTITUTION OF THE UNITED STATES OF AMERICA* 47-48, 54 (Corwin ed. 1952). The sixteenth amendment was proposed July 12, 1909, and ratification was completed on February 3, 1913, while the twenty-second amendment was proposed on March 24, 1947, and ratification was completed on February 27, 1951.

provide for a four-year application life.⁶⁴ It is at least possible that, even if Congress adopted such a specific time period as long as seven, six, or four years, applications tendered during such a period might be treated as merely entitled to a presumption of timeliness, absent evidence to the contrary.

E. *Right of States To Withdraw Their Applications*

May a state legislature withdraw its application for a convention if it subsequently changes its mind? It has been argued that under article V only forward steps can be taken and that therefore a state cannot effectively withdraw an application for a convention.⁶⁵ This view seems entirely erroneous and untenable. It would base the presence of a sufficient number of applications solely upon a mechanical process of addition and ignore the extent to which each application reflects the existence of the requisite contemporaneous agreement. As one commentator noted, the requirement that applications be contemporaneous is inconsistent with the view that they may not withdraw their applications prior to the submission of the same by two-thirds of the states.

[I]f States were not permitted to rescind their application . . . [the] requirement [that they be contemporaneous] would not, in truth and in fact be met, since the general sentiment for a convention could not be said to exist in the necessary two-thirds of the States when one or more of those States are attempting to withdraw their applications.⁶⁶

Consequently, in determining whether two-thirds of the states have applied for a convention, applications which have been rescinded should be disregarded;⁶⁷ they no longer evidence any present intent that a convention should be called. Senator Ervin's proposed statute takes the same position and provides that:

A State may rescind its application calling for a constitutional convention by adopting and transmitting to the Congress a resolution

64. S. 2307, 90th Cong., 1st Sess. § 5 (1967) (amended bill); Ervin appx., 66 MICH. L. REV. 896, 897-98 (1968).

65. Note, *Rescinding Memorialization Resolutions*, 30 CHI.-KENT. L. REV. 339 (1952).

66. C. BRICKFIELD, STAFF OF HOUSE COMM. ON THE JUDICIARY, 85TH CONG., 1ST SESS., PROBLEMS RELATING TO A FEDERAL CONSTITUTIONAL CONVENTION 46 (Comm. Print 1957).

67. See AMERICAN ENTERPRISE INSTITUTE, SPECIAL ANALYSIS, A CONVENTION TO AMEND THE CONSTITUTION? 32-33 (1967); Fensterwald, *Constitutional Law: The States and the Amending Process—A Reply*, 46 A.B.A.J. 717, 719 (1960); Grinnel, *Petitioning Congress for a Convention: Cannot a State Change Its Mind?*, 45 A.B.A.J. 1165 (1959); Note, *Proposing Amendments to the United States Constitution by Convention*, 70 HARV. L. REV. 1067, 1071 (1957). *Contra*, Packard, *Constitutional Law: The States and the Amending Process*, 45 A.B.A.J. 161 (1959).

of rescission in conformity with the procedure specified . . . [earlier in this statute] except that no such rescission shall be effective as to any valid application made for a constitutional convention upon any subject after the date on which two-thirds or more of the State legislatures have valid applications pending before the Congress seeking amendments on the same subject.⁶⁸

Precedents that deny states the right to rescind their ratifications of interstate compacts⁶⁹ or constitutional amendments⁷⁰ are not apposite here. Ratification is the final act by which sovereign bodies confirm a legal or political agreement arrived at by their agents.⁷¹ Applications for a constitutional convention, however, are merely formal requests by state legislatures to Congress, requesting the latter to "call a Convention for proposing Amendments" because there is a present consensus that such action is desirable. Consequently, they do not share the dignity or finality of ratifications which might justify the latter's irrevocable nature.⁷² In this connection it should be noted that state legislatures seem to have been of the opinion that subsequent withdrawal of their applications would be both permissible and effective.⁷³ The action of any state legislature in rescinding its application for a convention to propose the Dirksen amendment should, therefore, be fully effective.

F. *Counting Applications: The Requirement of Receipt
by Congress and Like Subject Matter*

As noted earlier, four of the thirty-two states making application for a constitutional convention have not formally tendered their petitions to Congress as such. Two of these petitions appear in the *Congressional Record*, inserted there by members of Congress who presumably received them from their home state's legislature.⁷⁴ The other two are not in the *Congressional Record*, but at least one of

68. S. 2307, 90th Cong., 1st Sess. § 5(b) (1967) (amended bill); Ervin appx., 66 MICH. L. REV. 896, 897-98 (1968).

69. See *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22 (1951).

70. There is precedent for congressional refusal to permit a state to withdraw its ratification. Congress did so during Reconstruction when several states attempted to withdraw their ratification of the post-Civil War amendments. The decision of Congress in that case seems clearly wrong, but its action may be attributed to the unusual temper of the times. See Clark, *The Supreme Court and the Amending Process*, 39 VA. L. REV. 621, 624-26 (1953); Grinnel, *supra* note 67, at 1165.

71. Fensterwald, *supra* note 67, at 719.

72. The common sense of article V, however, would seem to be that ratifications can also be effectively rescinded anytime before three-fourths of the states lend their assent to the proposed amendment. *But see* note 70 *supra*.

73. BRICKFIELD, *supra* note 66, at 46, 96.

74. 111 CONG. REC. 12853 (1965) (New Hampshire); 111 CONG. REC. 4320 (1965) (Utah).

them was transmitted to the state's congressmen.⁷⁵ The question presented is whether these applications for a convention can, irrespective of their other attributes, properly be counted in light of the fact that they were never formally submitted to Congress.

Some persons contend that these four resolutions just described may not be counted because "they have not been validly submitted to Congress."

[These] resolutions were passed by legislatures which then adjourned without taking the final step of formally sending their petitions to Congress—a step which would appear to be required if there is to be any orderly way of determining whether a sufficient number of States have validly requested the calling of a convention. These resolutions thus have the status of unfinished legislative business at the State level. Their ability to be considered by Congress expired when the enacting legislatures expired. Until and unless these resolutions are reenacted, they cannot serve as the basis on which this or any future Congress can call a constitutional convention.⁷⁶

While this argument has some force, it is ultimately unpersuasive.

Actual physical submission of the application to the Speaker or Clerk of the House and the President or Secretary of the Senate is no formal part of the state legislative process. That process ends and is complete with the final adoption of the state resolution according to the rules and procedures of the state legislature.⁷⁷ Consequently, the required intent of the state legislature for purposes of article V is fully, adequately, and formally expressed when all the legislative requisites are fulfilled. What remains is only the actual communication to Congress of the application. The precise manner in which that communication is accomplished does not seem to be of large constitutional significance if there is some means of easily verifying the existence and authenticity of such a legislative resolution. As one commentator noted:

Advocates of the proposed convention point out that Congress has not enacted any law for the guidance of state legislatures in communicating applications for a convention to the Congress; that the adoption of such applications is a matter of public record, and that the essential question is not whether copies were submitted to the

75. AMERICAN ENTERPRISE INSTITUTE, *supra* note 67, at 15-16 (Georgia and Colorado). See *id.* at 16, n.1.

76. 113 CONG. REC. S.5455 (daily ed. April 19, 1967) (remarks of Senator R. Kennedy).

77. State applications must be valid legislative resolutions on this subject according to state law. See S. 2307, 90th Cong., 1st Sess. § 3 (1967) (amended bill). See also Forkosch, *The Alternative Amending Clause in Article V: Reflections and Suggestions*, 51 MINN. L. REV. 1053, 1057-58 (1967).

proper officers of the Congress, but whether they were in fact adopted.⁷⁸

The point is that failure to tender the formal written applications to Congress should be considered, at most, harmless procedural error in a situation like the present one where there is no statutorily designated special repository for such applications. Absent a statute on the subject, why should the means of communication reflect on the validity of a petition? Of course, it would be tidy and probably desirable to settle the matter by statute, as Senator Ervin's bill does,⁷⁹ in order to avoid confusion and regularize the procedure. But absent statutory regularization, Congress should take "official notice" of known and verified official state actions of this sort, even though they have not been officially received by the appropriate congressional authorities.⁸⁰ Congress has done this in other types of situations,⁸¹ and should not hesitate to do so in the present case.⁸² In any event, even if the word "Application" in article V should be deemed to imply a direct written communication from the state legislature to the Congress, absent statutes to the contrary, the submission of those applications to the state's congressional delegation should be deemed sufficient.⁸³

Another factor to be considered in counting the state applica-

78. AMERICAN ENTERPRISE INSTITUTE, *supra* note 67, at 17.

79. Within thirty days after the adoption by the legislature of a State of a resolution to apply for the calling of a constitutional convention, the secretary of state of the State, or if there be no such officer, the person who is charged by the State law with such function, shall transmit to the Congress of the United States two copies of the application, one addressed to the President of the Senate, and one to the Speaker of the House of Representatives. . . . [The application must] be accompanied by a certificate . . . certifying that the application accurately sets forth the text of the resolution.

S. 2307, 90th Cong., 1st Sess. §§ 4(a), 4(b)(3) (1967) (amended bill) (the original bill set a time limit of sixty days); Ervin appx., 66 MICH. L. REV. 896-97 (1968).

80. AMERICAN ENTERPRISE INSTITUTE, *supra* note 67, at 17. *Contra*, Forkosch, *supra* note 77, at 1059-60.

81. RULES AND MANUAL OF THE HOUSE OF REPRESENTATIVES, H.R. DOC. NO. 459, 86th Cong., 2d Sess. 80, § 236 (1960): "Freshman members of the U.S. House are allowed to take their seats in cases where the credentials are delayed or lost and there is no doubt of the election or where the governor of a state has declined to give credentials to a person whose election was undoubted and uncontested."

82. Presumably, any application for an article V convention contained in a properly adopted state legislative resolution is a part of the legislative acts of the state, a certified copy of which can easily be obtained from the appropriate state official.

83. By the Rules of the United States House of Representatives, members having petitions to present may do so by delivering them to the Clerk and the petition will be entered on the *Journal* and in the *Congressional Record*. RULES AND MANUAL OF THE HOUSE OF REPRESENTATIVES, H.R. DOC. NO. 459, 86th Cong., 2d Sess. 441-43 (1961); THE CONSTITUTION OF THE UNITED STATES OF AMERICA 916 (N. Small & L. Jayson ed. 1964). Should the failure of a state's members of Congress to do their duty frustrate the state's application?

tions relates to the identity of the issues requested to be dealt with in convention. If, as assumed here, article V contemplates applications for a plenary convention which would propose to the states its own solution to a particular problem, rather than one to approve or disapprove the states' solution, such a convention could lawfully be convened only when there are a sufficient number of proper applications requesting a convention to solve *the same problem or deal with the same issue*.⁸⁴ That is, Congress may not properly call an article V convention unless a sufficient number of appropriate and timely applications agree on the problem or general subject that such a body should consider. Many of the same reasons advanced for the proposition that applications must be reasonably contemporaneous apply here also. Sufficient national agreement to warrant the calling of a convention is evidenced only if the legislatures of two-thirds of the states agree that a convention is needed to deal with the same problem or subject matter. But the state petitions need not otherwise be identical. One commentator noted in this connection that "Congress would have to determine whether the language of State applications seeking an amendment on a specific subject should be identical in their texts, or whether applications using varying language but appertaining to the same subject matter generally would be acceptable. Clearly the latter method is preferable."⁸⁵ However, it is equally clear that disparate state applications seeking a convention to solve different issues or problems cannot be properly counted together because they do not demonstrate any consensus.

There will always, of course, be some difficulty in characterizing the scope of the issue, problem, or subject matter for these purposes. It can be persuasively argued, if one draws the issue or subject matter limitation realistically, that some of the current applications can-

84. If applications for approval or disapproval of a particular amendment were proper, only petitions demanding proposal to the states of amendments which were identical, at least in substance, can be counted together because only they agree on and ask for the same convention.

85. BRICKFIELD, *supra* note 66, at 20-21 [citing Corwin & Ramsey, *The Constitutional Law of Constitutional Amendment*, 26 NOTRE DAME LAW. 185, 194 (1951)]. It is sufficient if the specific constitutional changes suggested by each application concern the same general subject matter; it is not necessary that each application be identical or propose similar changes in that subject matter. See STAFF OF HOUSE COMM. ON THE JUDICIARY, 82D CONG., 2D SESS., PROBLEMS RELATING TO STATE APPLICATIONS FOR A CONVENTION TO PROPOSE CONSTITUTIONAL LIMITATIONS OF FEDERAL TAX RATES 15 (Comm. Print 1952); Corwin & Ramsey, *supra*, at 195-96; Note, *supra* note 69. But see L. ORFIELD, AMENDING THE FEDERAL CONSTITUTION 42 (1942); Wheeler, *Is a Constitutional Convention Impending?*, 21 ILL. L. REV. 782, 795 (1927).

not be counted together because they desire convention consideration and solution of different and disparate issues. As Senator Robert Kennedy recently noted:

Twenty-nine of them request a convention to pass an amendment permitting one house in a bicameral legislature to be malapportioned. The other three seek only to abrogate the power of the Federal judiciary to deal with apportionment.

We are told that these two groups of resolutions can be linked together. But certainly that cannot be. One group wants the judiciary stripped of jurisdiction and left without power to deal with malapportionment in either chamber of a State legislature. There is no basis on which Congress can conclude that that group also wants an amendment which leaves power in the courts and sanctions malapportionment in only one house of a bicameral legislature. Those legislatures which may have believed it wrong for the Federal courts to enter the "political thicket" at all may not have wanted to guarantee the right of each State to malapportion one branch of its legislature. A request to shift power from one level to another in the Federal system is not the same as a request for permission to deny majority rule in a State legislature.⁸⁶

In fact, many states which first requested a convention to propose an amendment excluding the federal courts from reviewing the constitutionality of state legislative apportionment later felt compelled to issue new calls for a convention to consider an amendment permitting state legislatures to apportion one or both of their houses on a nonpopulation basis. "It therefore appears that even requesting States themselves do not believe that all the convention calls which have been made on the reapportionment issue can be 'stacked up' to reach the required 34."⁸⁷

Pushing the identity of subject matter requirement a bit further, Congress may not even be justified in counting together all of the first group of twenty-nine convention applications referred to by Senator Kennedy. Some of those request a convention to approve an amendment which would only permit state legislatures, under certain circumstances, to apportion one of their houses on a basis other than population; others would permit that and also permit the state to determine on a completely unfettered basis "how membership of governing bodies of its subordinate [or local government] units shall be apportioned."⁸⁸ Can it be said with any

86. 113 CONG. REC. S.5455 (daily ed. April 19, 1967) (remarks of Senator R. Kennedy). See also 113 CONG. REC. S.5453 (daily ed. April 19, 1967) (remarks of Senator Tydings).

87. 113 CONG. REC. S.4232 (daily ed. March 22, 1967) (remarks of Senator Tydings). See also 113 CONG. REC. S.5455 (daily ed. April 19, 1967) (remarks of Senator R. Kennedy).

88. See, e.g., applications tendered to the Eighty-ninth Congress by Arizona,

complete confidence that an application for a convention to propose an amendment concerning state power over the apportionment of its state legislature necessarily means that its maker also desires, or would consent to, a convention to propose an amendment on the subject of state power over the apportionment of its local government units?

Also, several of those twenty-nine applications call for a convention-proposed amendment to assure unfettered state freedom to apportion *both* houses of their legislatures. Most others follow the Dirksen amendment which would permit this only as to *one* house.⁸⁹ Nevertheless, these two groups might be counted together in determining the number of applications for a plenary convention to solve a certain problem or issue. They have similar though not identical objectives and deal with the same problem or subject—the extent to which the states should have power over their legislatures' apportionment.

G. *The Validity of Applications From Malapportioned Legislatures*

"Should Congress [automatically] regard as invalid petitions from malapportioned legislatures calling for a constitutional amendment to authorize malapportionment?"⁹⁰ Senator Tydings, among others, has opined that "26 of the 32 resolutions were invalidly enacted [and hence should be ignored] since that many legislatures were malapportioned when they passed these petitions."⁹¹ The argument is that "[f]or Congress to accept such petitions would be like permitting all Democrats to have two votes in a referendum to determine whether or not Democrats should have two votes."⁹² Elaborating on this theme, the Senator argues that malapportioned legislatures applying for a constitutional amendment to perpetuate their illegitimate status do not have "clean hands" and, therefore, their petitions

Arkansas, Florida, and Idaho, contained in E. YADLOSKY, STATE PETITIONS AND MEMORIALS TO CONGRESS ON THE SUBJECT OF APPORTIONMENT OF STATE LEGISLATURES, LIBRARY OF CONGRESS LEGISLATIVE REFERENCE SERVICE REPORT JK140C-32/205R (to Aug. 5, 1965).

89. See, e.g., applications tendered to the Eighty-ninth Congress by Alabama, Alaska, Arizona, and Arkansas contained in YADLOSKY, *supra* note 88.

90. 113 CONG. REC. S.5451 (daily ed. April 19, 1967) (remarks of Senator Tydings) (emphasis added). This is a different question from that considered previously in section I.D., "Timing of the Applications for a Convention." There, one of the issues was the continued validity of a state application tendered by a malapportioned legislature in light of that body's subsequent apportionment on a more popular basis.

91. 113 CONG. REC. S.5455. See also 113 CONG. REC. S.5457-58 for a table listing twenty-six states whose applications were enacted by malapportioned legislatures.

92. 113 CONG. REC. S.4209 (daily ed. March 22, 1967) (remarks of Senator Proxmire).

for a convention on this subject should be ignored. It may be conceded, he says, that a "malapportioned legislature may be competent, pending its reapportionment, to pass legislation generally. But such a legislature has no competence to initiate amendments to the Constitution to make legal its own illegality."⁹³

Senator Tydings' argument is superficially attractive. The acts of malapportioned state legislatures are usually considered valid even if they appear to favor the over-represented interests.⁹⁴ Any other result "would produce chaos."⁹⁵ However, an improperly apportioned legislature may not be considered as equivalent to one properly apportioned for all purposes. Certain types of action which are within the capability of a *de jure* legislature may not be worthy of respect when engaged in by a body that is only *de facto*. The danger of validating certain kinds of acts performed by a malapportioned legislature may outweigh the danger created by the temporary lack of any body capable of acting on the subject. Acts "which flagrantly violate the citizens' right to equal representation and which even after reapportionment cannot readily be corrected"⁹⁶ may well be in this category. So, in *Petuskey v. Rampton*⁹⁷ a federal district court stated that "well-known general principles of equity require that the . . . [unconstitutionally apportioned] Legislature not consider or vote upon any proposal to amend the Constitution of the United States on the subject of legislative reapportionment."⁹⁸ The dangers of a contrary rule are apparent. If their actions on this subject were given effect, malapportioned legislatures might be able to stall reapportioning themselves on the basis of population long enough to enable them to amend the Constitution and legalize their malapportionment.⁹⁹

93. 113 CONG. REC. S.5452 (daily ed. April 19, 1967) (remarks of Senator Tydings). See also 113 CONG. REC. S.5455 (remarks of Senator R. Kennedy); 113 CONG. REC. S.4232 (daily ed. March 22, 1967) (remarks of Senator Tydings).

94. *Ryan v. Tinsley*, 316 F.2d 430, 432 (10th Cir. 1963). See also 113 CONG. REC. S.5451 (daily ed. April 19, 1967) (remarks of Senator Tydings).

95. *Id.*

96. *Id.*

97. 243 F. Supp. 365 (D. Utah 1965).

98. *Id.* at 374.

99. 113 CONG. REC. S.5452 (daily ed. April 19, 1967) (remarks of Senator Tydings). Of course this is exactly what has happened. The effort to call a constitutional convention is a product of this approach, made manifest in several contexts. Consider, for example, the following comment by a federal judge:

It is interesting to note the speed by which the last [Utah] State Legislature memorialized Congress . . . to call a constitutional convention to provide for reapportionment "on factors other than population," which resolutions the State Senate passed on the tenth day of the session, compared to the Legislature's hesitancy to

In *Toombs v. Fortson*¹⁰⁰ a federal district court enjoined a malapportioned state legislature "from placing on the ballot . . . until the General Assembly is reapportioned in accordance with constitutional standards, the question whether a constitutional amendment [proposed by the malapportioned legislature and] purporting to amend the present state constitution by substituting an entirely new constitution therefor shall be adopted."¹⁰¹ The Supreme Court vacated this decree and remanded the case "for reconsideration of the desirability and need for the on-going injunction" in light of the election of new legislators since entry of the decree and the stipulation of the parties originally requesting the injunction that the case was now moot on that point.¹⁰² As the dissent noted, this disposition indicated approval by the Supreme Court of the lower court's injunction.¹⁰³

Some Civil War era cases are also relevant here. As a rule, the official actions of the de facto but not de jure Confederate state governments were recognized as valid.¹⁰⁴ However, efforts of those governments that were directed toward the perpetuation of the very things that made them de facto rather than de jure were deemed void. For example, bonds issued in aid of their prosecution of the war against the United States were held unenforceable.¹⁰⁵ The analogies and prior discussion, then, might justify recognition of a narrow rule invalidating any action of a malapportioned state legislature which would directly perpetuate or allow the continuance of its unrepresentative condition. If the rule were otherwise, these bodies would have within their grasp the unfettered authority to render secure for all time their presently unconstitutional condition.

This argument is certainly persuasive when applied to a malapportioned state legislature's attempt to *ratify* a proposed con-

properly reapportion under the mandate of this court, which action occurred on the final (sixtieth) day of the session.

Petuskey v. Rampton, 243 F. Supp. 365, 373 n.10 (D. Utah 1965).

100. 205 F. Supp. 248 (N.D. Ga. 1962), *vacated in part and remanded*, 379 U.S. 621 (1965).

101. *Fortson v. Toombs*, 379 U.S. 621, 621-22 (1965), *vacating in part and remanding* 205 F. Supp. 248 (N.D. Ga. 1962).

102. *Id.* at 622. It was allegedly moot due to the unclear intentions of the new legislature.

103. *Id.* at 627, 637-39.

104. See *Baldy v. Hunter*, 171 U.S. 388, 393-404 (1898); *Johnson v. Atlantic, Gulf & West India Transit Co.*, 156 U.S. 618 (1895); *Ketchum v. Buckley*, 99 U.S. 188 (1878); *Horn v. Lockhart*, 84 U.S. (17 Wall.) 570 (1873).

105. See *Baldy v. Hunter*, 171 U.S. 388, 393-402 (1898); *Lamar v. Micou*, 112 U.S. 452 (1884); *Sprott v. United States*, 87 U.S. (20 Wall.) 459 (1874); *Horn v. Lockhart*, 84 U.S. (17 Wall.) 570 (1873); *Thorington v. Smith*, 75 U.S. (8 Wall.) 1 (1868).

stitutional amendment which would legitimate its present condition;¹⁰⁶ but it seems unpersuasive as to convention applications. Indeed, recognition of the latter is less dangerous or injurious to democratic principle than acceptance of a malapportioned legislature's run-of-the-mill legislation, which is uniformly treated as binding law. When we treat the usual acts of a malapportioned state legislature as binding, we permit an illegitimate body to determine, on its own say-so, the rules by which we live and order our lives, liberty, and property. If we accept petitions from malapportioned state legislatures as valid applications for an article V convention, we only permit illegitimate power to authorize Congress to initiate or trigger a process which is constituted and operated wholly independently of that illegitimate power. Furthermore, the actions of that process will directly affect our lives, liberty, or property only after its product is ratified by three-quarters of the state legislatures.¹⁰⁷

It is, therefore, difficult to see why the act of a malapportioned legislature in applying for an article V convention on the subject of state legislative apportionment should be treated any differently in terms of its lawful effect than the normal run-of-the-mill legislation such a body creates.¹⁰⁸ An application of this sort does not enable the improperly apportioned body tendering it to preserve its own power or to control or influence the only process which can do so.

In this connection, a statement by Justice Harlan about the initiation of constitutional change on the state level should be noted:

I can find nothing in the Fourteenth Amendment, elsewhere in the Constitution, or in any decision of this Court which requires a State to *initiate* complete or partial constitutional change only by some method in which every voice in the voting population is given an opportunity to express itself. Can there be the slightest constitutional doubt that a State may lodge the power to initiate constitutional changes in any select body it pleases, such as a committee of the legislature, a group of constitutional lawyers, or even a "malapportioned" legislature—particularly one whose composition was considered, prior

106. Only properly apportioned legislatures can ratify such an amendment. Wolf, *An Antireapportionment Amendment: Can It Be Legally Ratified?*, 52 A.B.A.J. 326, 327 (1966). The fact that three-fourths of the states must approve is irrelevant since that is written into the Constitution and must, therefore, be accepted as a basic part of our social compact.

107. See Forkosch, *supra* note 77, at 1056-57.

108. U.S. CONST. art. V. See also note 106 *supra*.

to this Court's reapportionment pronouncements of June 15, 1964, to be entirely and solely a matter of state concern?¹⁰⁹

Justice Harlan's position seems sound. It may not be unreasonable to permit a minority of the population to trigger the amendment process so long as control over the process itself remains with the majority. Empowering a minority to trigger the process may even be advantageous in that it assures them democratic consideration of their grievances.

*Toombs v. Fortson*¹¹⁰ is not in conflict with this view. It recognized the vital distinction between according validity to actions of a malapportioned legislature which are a substantive part of the amending process and validating those which merely trigger the process. The court order in *Toombs* expressly refrained from interfering with the legislature's power to trigger the amending process by calling a popularly elected and properly apportioned convention which could itself draft a new constitution.¹¹¹ That order only prohibited the malapportioned legislature from submitting to the people a new constitution that *it* had drafted.

II. THE CONSTITUTIONAL CONVENTION AND ITS PRODUCT

A. *Must Congress Call a Convention?*

If the requisite number and type of proper article V applications are tendered to Congress within a "reasonable" time of each other, is Congress under an absolute obligation to call a constitutional convention or can it refuse on the grounds, for example, that such a body is not really necessary or desirable? Article V states: "On the Application of the Legislatures of two thirds of the several States [Congress] shall call a Convention for proposing Amendments." From this language alone it would seem clear that Congress was intended to be under a firm and nondiscretionary obligation to call a convention when sufficient applications from two-thirds of the states are tendered. The word "shall" as used in article V is clearly mandatory.

Other evidence also supports this conclusion. The debates in the Constitutional Convention of 1787 indicate that, in fact, the

109. *Fortson v. Toombs*, 379 U.S. 621, 626 (1965).

110. 205 F. Supp. 248 (N.D. Ga. 1962), *vacated in part and remanded*, 379 U.S. 621 (1965).

111. *Id.* at 258-59.

primary purpose of the convention method was to afford a means of proposing amendments when the people were confronted by a Congress opposed to the change.¹¹² It is obvious that to permit congressional discretion here would be to defeat this purpose. Hamilton, writing in *The Federalist*, made the following comment:

By the fifth article of the plan, the Congress will be obliged "on application of the legislatures of two-thirds of the states . . . to call a convention for proposing amendments. . . ." The words of this article are peremptory. The Congress "shall call a convention." Nothing in this particular is left to the discretion of that body.¹¹³

Other contemporary evidence is in accord. For example, one delegate to the North Carolina ratifying convention explained the provision of article V under discussion here by noting "that it is very evident that . . . [the proposal of amendments] did not depend on the will of Congress; for . . . the legislatures of two-thirds of the States were authorized to make applications for calling a convention to propose amendments, and, on such application, it is provided that Congress shall call such convention, so that they will have no option."¹¹⁴ It therefore seems clear that if Congress receives within a "reasonable" time period, proper applications for an article V convention to deal with a certain subject from two-thirds of the state legislatures, it is absolutely bound to convene such a body.¹¹⁵

112. When final debate on article V began in the Constitutional Convention, the draft being considered provided that "the Congress, whenever two thirds of both Houses shall deem necessary, or on the applications of two thirds of the Legislatures of the several States shall propose amendments to this Constitution" 2 *THE RECORDS OF THE FEDERAL CONSTITUTION* 629 (M. Farrand ed. 1937).

"Col. Mason thought the plan of amending the Constitution exceptionable & dangerous. As the proposing of amendments is in both the modes to depend, in the first, immediately, and in the second, ultimately, on Congress, no amendments of the proper kind would ever be obtained by the people, if the government should become oppressive" *Id.* at 629. As a result, Mr. Gouverneur Morris and Mr. Gerry moved to amend the article to require a convention or application of two-thirds of the states. "Mr. Madison did not see why Congress would not be as much bound to propose amendments applied for by two thirds of the States as to call a call [*sic*] a Convention on the like application." *Id.* at 629-30.

113. *THE FEDERALIST* No. 85, at 546 (Wright ed. 1961) (Hamilton).

114. IV J. ELLIOT, *DEBATES ON THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 178 (2d ed. 1937).

115. See 1 W. WILLOUGHBY, *THE CONSTITUTIONAL LAW OF THE UNITED STATES* § 331 (2d ed. 1929); Forkosch, *supra* note 77, at 1062-67; Packard, *Legal Facets of the Income Tax Rate Limitation Program*, 30 *CHI.-KENT L. REV.* 128, 133-34 (1952); Sorensen, *The Quiet Campaign To Rewrite the Constitution*, *SAT. REV.*, July 15, 1967, at 17-18; Tuller, *A Convention To Amend the Constitution*, 193 *N. AMER. REV.* 369, 375-78 (1911); Note, *supra* note 67, at 1067 (1957). *Contra*, Platz, *Article V of the Federal Constitution*, 3 *GEO. WASH. L. REV.* 17, 44 (1934).

B. *Improper Convention Calls, Improper Refusals To Summon a Convention, and the Judiciary: A Brief Note*

At the behest of a proper litigant may the judiciary independently determine the adequacy, timeliness, and validity of the state petitions for an article V convention and either (1) enjoin the operation of such a convention if it has been improperly called and void its product or (2) force Congress to summon such a body if Congress has improperly refused to do so? The court's authority to afford the one remedy seems coextensive with the other since a decision on a single legal issue is involved in both cases: the sufficiency of the state applications for purposes of an article V convention call. If a court undertakes to decide that issue at all, it must be prepared to implement its decision by affording the one remedy or the other, as the case requires.

It has been suggested that the courts can and should decide the constitutionality of the procedures involved in any effort to amend our fundamental law so long as such questions are presented in suits otherwise properly before them. The point is made that "the Constitution does not expressly or impliedly except the amending process from the judicial power of the federal courts."¹¹⁶ Furthermore, if "orderly procedure," legitimated through the process of judicial review, "is essential in the enactment of ordinary statutes, should it not be even more so as to the adoption of important and permanent constitutional amendments?"¹¹⁷ Substantial Supreme Court precedent supports this view and indicates that at least some of the procedural questions which may arise in the amending process can be settled on the merits by the judiciary.¹¹⁸ Failure to com-

116. ORFIELD, *supra* note 85, at 21 n.51; Quarles, *Amendments to the Federal Constitution*, 26 A.B.A.J. 617 (1940).

117. ORFIELD, *supra* note 85, at 21.

118. See *United States v. Sprague*, 282 U.S. 716 (1931) (Congress may choose ratification by state legislatures rather than by conventions, even if the amendment should enlarge federal powers at the expense of "powers reserved to the people" by the tenth amendment); *Leser v. Garnett*, 258 U.S. 130 (1922) (the states cannot exclude or restrict the power of their legislatures to ratify amendments to the federal constitution); *Dillon v. Gloss*, 256 U.S. 368 (1921) (Congress, in proposing an amendment to the Constitution, may fix a reasonable time for ratification); *National Prohibition Cases*, 253 U.S. 350 (1920) (proposal by two-thirds of both houses of Congress requires only the assent of two-thirds of the members present as long as these constitute a quorum to do business); *Hawke v. Smith*, No. 1, 253 U.S. 221 (1920) (the states may not submit the ratification decision to a popular referendum); *Hollingsworth v. Virginia*, 3 U.S. (3 Dall.) 378 (1798) (the President does not participate in the proposal of an amendment). Note that all these decisions on the merits went against the challengers. In addition, "state courts have frequently and by the great weight of authority held that they may pass upon the validity of the procedure of amending the state constitutions, even though there be no express basis therefor." ORFIELD, *supra* note 85, at 20-21. See

ply with the constitutional procedures, including those involved in the convening of any article V convention, may result, then, in a finding that an amendment was not properly proposed or adopted and is therefore invalid.¹¹⁹ Indeed, at the behest of a proper litigant a court might even enjoin the election of delegates to any improperly called convention.

Similarly, it has been contended that a congressional failure to call an article V convention when the prerequisites for summoning such a body have been met can be upset in the courts. That is, in a proper suit Congress can be compelled to summon an article V convention if it is legally bound to do so. The theory is that since calling the convention is a ministerial act, the courts may force Congress to do its duty.¹²⁰ Recent Supreme Court cases dealing with state legislative apportionment are said to support this view.¹²¹ If the courts can force state legislatures to follow the Constitution and properly apportion themselves, they could and would make Congress perform its duty under article V.

On the other hand, it can be argued with great force that the central issue in both these situations—the sufficiency of the resolutions for article V purposes—is a nonjusticiable political question,¹²² the resolution of which is committed exclusively and finally to Congress. Consequently, the judicial branch may not interfere affirmatively or negatively to implement its own views as to the propriety of congressional action in calling or refusing to call a convention.¹²³

generally id. at 12-22, for cases holding that the validity of the procedures utilized in the adoption of a state constitutional amendment is justiciable.

119. The courts will adjudicate on the merits the validity of a constitutional amendment in light of some alleged procedural defects that may have vitiated its proper proposal or adoption. *See* *Dillon v. Gloss*, 256 U.S. 368 (1921); *National Prohibition Cases*, 253 U.S. 350 (1920); *Hawke v. Smith*, No. 1, 253 U.S. 221 (1920); *Hollingsworth v. Virginia*, 3 U.S. (3 Dall.) 378 (1798). *But see* *Maryland Petition Comm. v. Johnson*, 265 F. Supp. 823 (D. Md. 1967), holding that whether the fourteenth amendment had been properly proposed and ratified was a nonjusticiable political question. *See also* *United States v. Gugel*, 119 F. Supp. 897 (E.D. Ky. 1954); *Heintz v. Bd. of Educ.*, 213 Md. 340, 131 A.2d 869 (1957) holding the same way.

120. Cuvillier, *Shall We Revise the Constitution?*, 77 *FORUM* 321, 323-25 (1927); Packard, *Constitutional Law: The States and the Amending Process*, 45 *A.B.A.J.* 161 (1959); Packard, *Legal Facets of the Income Tax Rate Limitation Program*, 30 *CHL-KENT L. REV.* 128 (1952); Tuller, *supra* note 115, at 379-81.

121. 113 *CONG. REC.* S.6654-55 (daily ed. May 10, 1967) (remarks of Senator Hruska).

122. *See* Wheeler, *supra* note 85, at 791-92; Note, *Proposing Amendments to the United States Constitution by Convention*, 70 *HARV. L. REV.* 1067, 1071 (1957).

123. *See also* S. 2307, 90th Cong., 1st Sess. §§ 5(c), 6(a) (1967) (amended bill); Ervin appx., 66 *MICH. L. REV.* 896, 898 (1968). Although the original Ervin bill deferred to the state legislatures on the validity of the adoption procedure, new § 3(b) provides that "[q]uestions concerning the State legislative procedure and the validity of the adoption of a State resolution cognizable under this Act shall be determinable by the

While there is no case directly on point, the dicta of four justices of the Court in *Coleman v. Miller*¹²⁴ should be recalled: "Undivided control of [the amending] process has been given by . . . Article [V] exclusively and completely to Congress. The process itself is 'political' in its entirety, from submission until an amendment becomes part of the Constitution, and is not subject to judicial guidance, control or interference at any point."¹²⁵ A number of more recent lower court cases are in accord.¹²⁶

Persuasive arguments favor the view that questions arising in the amending process are nonjusticiable. The most important of these rests upon the notion that in our democracy the practice of judicial review is not a necessary deduction from the language of the Constitution. Rather, it is a "practical condition upon its successful operation" which inevitably conflicts with the basic postulate of majority rule.¹²⁷ Even viewing judicial review as a desirable "sober second thought of the community," calculated to perpetuate our adherence to higher principles,¹²⁸ does not completely rationalize the process with democratic theory; that reconciliation occurs only if the people can ultimately put an absolute brake upon the courts' elaboration of our basic societal principles.¹²⁹ The most lasting and directly effective way for the people to do this is by amending the Constitution. Consequently, there may be some special sense in suggesting that the judiciary refrain from interfering as a decision maker in the only process by which the body politic can directly overturn what it considers to be erroneous judgments of nonelective courts interpreting the overriding national values upon which our society rests.

It is one thing for the Court to strike down . . . [a particular] Law as incompatible with its choice of constitutional values, and it is difficult enough to square this with democratic principle, but it would seem to be quite a different matter if the Court could, by a narrow interpretation of the amendment procedures, prevent the

Congress of the United States and its decisions thereon shall be binding on all others, including State and Federal courts."

124. 307 U.S. 433 (1939).

125. *Id.* at 459 (1939) (concurring opinion).

126. See, e.g., *Maryland Petition Comm. v. Johnson*, 265 F. Supp. 823 (D. Md. 1967); *United States v. Gugel*, 119 F. Supp. 897 (E.D. Ky. 1954); *Heintz v. Board of Educ.*, 213 Md. 340, 131 A.2d 869 (1957).

127. L. HAND, *THE BILL OF RIGHTS* 13-15 (1958). *Contra*, H. WECHSLER, *PRINCIPLES, POLITICS AND FUNDAMENTAL LAW* 3-15 (1961).

128. A. BICKEL, *THE LEAST DANGEROUS BRANCH* 26 (1962) [quoting Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4, 25 (1936)].

129. *Id.* at 258.

ratification of . . . [an] amendment which was intended to overrule . . . [one or more of its decisions respecting the meaning of our fundamental law.] Of course, the amendment process is itself governed by the Constitution, and it is by no means inconceivable that an amendment might be unconstitutional. But this seems to be one instance in which the Court cannot assume responsibility for saying "what the law is" without, at the same time, undermining the legitimacy of its power to say so. I do not find it paradoxical to insist that judicial review in a democracy remains defensible only to the extent that the Court itself will be defenseless against the processes through which the community may assert and enforce its own considered understanding of its basic code.¹³⁰

For this reason, a judicial effort to enjoin the calling of an article V convention or to void any proposal it made because the applications upon which that convention was based were inadequate, invalid, or untimely would be at war with the proper role of the judiciary in our system.

Furthermore, there may be a "textually demonstrable constitutional commitment of [this particular] issue to a coordinate political department."¹³¹ That is, since article V states that *Congress* is to call a convention on receipt of the proper number of article V applications, it may intend that Congress be the final judge of their validity in all respects. This reading of article V is reinforced by the fact that the organization and make-up of the convention is not specified in the Constitution, but is instead left to the political discretion of Congress. If Congress was not to be the final judge of the sufficiency of convention applications, why vest it with such a large discretion which, as will be noted shortly, would effectively disable the courts from forcing Congress to do its duty?

By the same token, it can be argued that the validity of state applications for an article V convention is nonjusticiable because of "the impossibility of a court's undertaking independent resolution [of the question] without expressing lack of the respect due coordinate branches of government."¹³² It is relevant in this connection to recall that the courts have never issued an injunction or writ of mandamus directly against the President or Congress because of the doctrine of separation of powers embodied in the Constitution and the consequent obligation of respect owed co-equal

130. Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 *YALE L.J.* 517, 589 (1966).

131. *Baker v. Carr*, 369 U.S. 186, 217 (1962).

132. *Id.*

branches of the national government by the federal judiciary.¹³³ To do so here in an effort to bar or force the calling of a convention would reflect a "lack of respect" for the actions of a coordinate branch of the federal government in regard to a subject that may even textually be exclusively committed to its judgment by the Constitution.¹³⁴

A further point should be noted with respect to the judiciary's incapacity in this area. The courts may not force congressional action as to an article V convention¹³⁵ because, even reading prior cases relatively narrowly, certain determinations respecting the validity of the state applications are most certainly within the exclusive province of Congress. *Coleman v. Miller* suggests at the very least that the timeliness of state applications and their continued validity in light of attempts to withdraw them are nonjusticiable political questions.¹³⁶ Consequently, Congress' decision on these questions will conclusively bind the courts and necessarily disable them from playing any positive role in deciding whether a convention call is or is not warranted; for determina-

133. In *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475 (1867), the Supreme Court unanimously held that the President himself is not accountable to any court, save the Senate sitting as a court of impeachment, either for the nonperformance of his constitutional duties or for the exceeding of his constitutional powers. "The Congress is the legislative branch of the government; the President is the executive department. Neither can be restrained in its action by the judicial department; though the acts of both, when performed, are, in proper cases, subject to its cognizance." *Id.* at 500.

134. C. BRICKFIELD, STAFF OF HOUSE COMM. ON THE JUDICIARY, 85TH CONG., 1ST SESS., PROBLEMS RELATING TO A FEDERAL CONSTITUTIONAL CONVENTION 27 (Comm. Print 1957), states: "It seems more likely, however, that the courts would refuse to issue such a writ [of mandamus against Congress ordering it to hold a convention] for the same reasons that they have refused to issue writs on the President of the United States, namely the doctrine of separation of powers which proscribes action by one branch of our government against another." See also *Powell v. McCormack*, 266 F. Supp. 354 (D.D.C. 1967), holding that the separation of powers prevents a federal district court from entertaining on the merits Adam Clayton Powell's suit charging that the House improperly excluded him from membership in violation of the Constitution. Of course, if the Supreme Court reverses that decision, the argument here on the nonjusticiability of this issue may be weakened.

135. I WILLOUGHBY, *supra* note 117, § 331; Fensterwald, *Constitutional Law, the States and the Amending Process—A Reply*, 46 A.B.A.J. 717, 720 (1960). *Contra*, Packard, *Constitutional Law: The States and the Amending Process*, 45 A.B.A.J. 161, 196 (1959).

136. *Coleman v. Miller*, 307 U.S. 433 (1939), held that the effectiveness of a state's ratification of a proposed amendment which it had previously rejected, and the period of time within which a state could validly ratify a proposed amendment were nonjusticiable political questions within the exclusive and irrevocable determination of Congress. Of course, as noted earlier, the case can be read much more broadly, and the dictum justifies the propriety of that latter position. See *id.* at 457-59 (concurring opinion). See Dowling, *Clarifying the Amending Process*, 1 WASH. & LEE L. REV. 215 (1940).

tions of the prior questions are prerequisites for any determination of the latter.

Cases holding that the federal courts can force the states to reapportion their legislatures,¹³⁷ or that they can force state legislatures to draw congressional districts so that they are as nearly equal in population as practicable¹³⁸ are inapposite here. The reason for this is that "it is the relationship between the judiciary and the coordinate branches of the Federal Government, and not the federal judiciary's relationship to the States which gives rise to the 'political question.'"¹³⁹ That is, "[t]he nonjusticiability of a political question is primarily a function of the separation of powers."¹⁴⁰ Judicial review on the merits of state legislative apportionment or the drawing of congressional districts by the states only involve federal judicial superintendence of *state* action or inaction; but judicial review of Congress' action or inaction respecting an article V convention directly involves the federal courts in a confrontation with a constitutionally co-equal branch of the federal government.

There is another very practical reason why the legislative reapportionment cases are no authority for judicial intervention to *force* a convention call: The scope and nature of the decisions that courts must make to fashion a remedy, and their practical ability to implement that remedy, are not at all similar in the two contexts. Courts "are understandably reluctant to give orders which either will not be enforced or are practically unenforceable";¹⁴¹ and, in the same vein they will not attempt to solve problems that are "in fact soluble only by a legislative solution which a court is totally incapable of providing."¹⁴² In the legislative apportionment situation, there is an existing body or model with which a court can tinker in minor ways to achieve its goal. To implement a reapportionment decree a court need only make those few adjustments and alterations of an existing and functioning institution which are absolutely necessary to secure districts of equal population. The situation in the present case, however, is quite different.

If Congress refused to act after being ordered to call the convention, what could a court do? Would it call the convention itself? On what basis would it constitute and implement the selection of

137. *Baker v. Carr*, 369 U.S. 186 (1962).

138. *Wesberry v. Sanders*, 376 U.S. 1 (1964).

139. *Baker v. Carr*, 369 U.S. 186, 210 (1962).

140. *Id.*

141. E. CAHN, *SUPREME COURT AND SUPREME LAW* 39 (1954).

142. *Id.* at 38.

such a body in light of the fact that the myriad details involved in the summoning of such a convention are left by the Constitution to the discretionary political judgment of Congress?¹⁴³ Any judicial effort to summon a convention on its own, as a means of curing Congress' default, would require a court to settle *de novo*, and without benefit of any present or past convention under this Constitution to guide it, such questions as the following: What should be the basis of the convention's apportionment of representation and voting power? Should the members apportioned to each state be elected at-large in that state or by districts? What election procedures and machinery will govern the election of convention delegates and who will implement and set up that machinery? How many convention delegates should there be? What qualifications must delegates have? When and where should the convention meet? What procedures, if any, should bind the convention? How are its expenses to be paid and what shall they be? What staff, if any, shall the convention have? Even if these questions are answered, it is most doubtful that a court could ever implement its choices as to the composition, structure, organization, and financing of a national constitutional convention. Surely a court could not, for example, appropriate money to finance the convention when the Constitution expressly vests the appropriation power exclusively in Congress.¹⁴⁴ But more basically, a court could not make the choices which it must in order to call a convention itself on any basis that would be appropriate for judicial, as opposed to legislative, decision-making.¹⁴⁵

As noted earlier, the legislative apportionment situation is different because it presents the courts with a more manageable problem. The courts are more easily able to implement any remedy they devise in such cases since all the rules and machinery respecting the operation, financing, and election of state legislative bodies

143. The Constitution is silent on the organization of the convention. Since Congress is to call it, Congress must of necessity decide its composition. See text accompanying note 153 *infra*.

144. U.S. CONST. art. I, § 9 states: "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." "[I]t may be observed that court orders, even if it could be argued that the States had a right to bring legal actions in the courts against an unwilling Congress to call a convention, would have little meaning or effect since the courts lack the necessary tools to enforce their decisions against the Congress." BRICKFIELD, *supra* note 134, at 28. See also AMERICAN ENTERPRISE INSTITUTE, SPECIAL ANALYSIS, A CONVENTION TO AMEND THE CONSTITUTION? 47 (1967).

145. See *Baker v. Carr*, 369 U.S. 186, 217 (1962) (stating that one of the hallmarks of a political question is the "lack of judicially discoverable and manageable standards for resolving it").

already exist and will continue to function. Political-legislative-type questions as numerous or broad-scoped as those discussed above need not be decided in that context. The court need only modify an ongoing institution with respect to one factor—its districting—in order to ensure that its decision will be implemented. Judicial acceptance of the reapportionment cases on their merits does not, therefore, suggest any similar capacity or ability with respect to suits attempting to force Congress to call a national constitutional convention.

Consequently, Congress has a duty to call such a convention upon receipt of the proper number of article V applications and only on the receipt of the proper number of article V applications. But that constitutionally-imposed duty is not enforceable in the courts. The only remedy lies with the people at the polls.

C. *The President's Role in an Article V Convention Call*

Prior discussion of *Hollingsworth v. Virginia*¹⁴⁶ suggests that the President's signature is not required for the valid issuance of an article V convention call. If this be so, the President's failure to join in the congressional summons of such a convention would in no way impair the validity of any amendment the latter body proposed. The language of article V supports this conclusion since it asserts that "the Congress" is to call a "Convention for proposing Amendments" on "the Application of the legislatures of two-thirds of the several states." The Ervin bill likewise specifies that such a convention be called pursuant to a concurrent resolution which does not require the President's assent.¹⁴⁷

Nevertheless, there is no unanimity on this point, and a contrary argument of substantial weight has been made.¹⁴⁸ The Constitution specifically provides in article I, section 7, that:

[e]very Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary . . . shall be presented to the President of the United States, and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two-thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the case of a Bill. [Emphasis added.]

146. 3 U.S. (3 Dall.) 378 (1798). This case held that the eleventh amendment was valid despite the fact that the President had not signed it after two-thirds of both Houses of Congress had agreed to submit it to the states. See text accompanying note 28 *supra*.

147. S. 2307, 90th Cong., 1st Sess. § 6(a) (1967) (amended bill); Ervin appx., 66 MICH. L. REV. 896, 898 (1968).

148. Black, *The Proposed Amendment of Article V: A Threatened Disaster*, 72 YALE L.J. 957, 962-64 (1963).

Hollingsworth v. Virginia recognized an exception to this required procedure in congressional proposal of constitutional amendments. But it can be argued that this mode of proposing constitutional amendments was taken out of the veto process solely because "the congressional proposal must be by two-thirds in each house, [and] it [therefore] may have been thought that the requirement for overriding the veto was already met."¹⁴⁹ This ground would not exist if Congress called a constitutional convention to propose amendments by a simple majority vote. It can therefore be argued that the commands of article I, section 7, apply to the convention call since it is an "Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives [are] . . . necessary." If this is true, the President must sign any call by Congress for a constitutional convention and if he vetoes it, Congress can override him only by a two-thirds vote of both Houses.

Additional support for this view can be gleaned from the fact—to be noted shortly—that Congress must specify how the convention is to be chosen, its organization, rules, and so forth. This being so, Congress must necessarily make more than a mere "call" for a convention. Such a call would be meaningless without the inclusion of the specific terms upon which such a body is to be constituted, organized, and conducted, and the inclusion of provisions for the precise means of implementing those terms. Legislation spelling out these matters would appear similar to the general kinds of legislation with which Congress normally deals. Consequently, no reason of logic dictates its different treatment in respect to the need for presidential approval.

The requirement of presidential concurrence here also seems logical and desirable on another ground. He is the only official who is elected by and responsible to the American people as a whole. His participation in this process that would intimately affect all Americans and our nation as a whole seems, therefore, especially proper and natural. The President's duty in such a case would be the same as that of Congress: To participate in a call only if, in good conscience, he deems the constitutional requisites for such a convention to have been properly met. If article V demands presidential concurrence in such a call, the refusal of the chief executive to act, like that of Congress, would probably be conclusive on the courts,¹⁵⁰ subject, however, to the right of Congress to override his

149. *Id.* at 965.

150. See text following note 133 *supra*.

judgment by a two-thirds vote. Nevertheless, it should be reiterated that the need for presidential concurrence in any congressional convention call might well be decided otherwise on the basis of article V's specific language directing "The Congress" to call a convention and the analogous case of *Hollingsworth v. Virginia*.¹⁵¹

D. *Congressional Authority Over the Convention:
Some Organizational and Procedural Problems*

The language of article V does not expressly indicate the extent of Congress' authority over the organization, constitution, and procedure of the convention. Indeed, Madison worried about these questions at the Constitutional Convention of 1789. "He saw no objection . . . against providing for a Convention for the purpose of proposing amendments, except only that difficulties might arise as to the form, the quorum, etc."¹⁵² Subject to constitutional limitations, Congress may of course solve these problems. Under its authority to call a convention, Congress has implied power to fix the time and place of meeting, the number of delegates, the manner and date of their election, their qualifications, the basis of apportioning delegates, the basis for voting in convention, the vote required in convention to propose an amendment to the states, and the financing and staffing of the convention.¹⁵³ Subsequent discussion will focus on the three most important questions that need to be resolved in this area: the basis for apportioning delegates and voting power in such a convention; the means of choosing delegates; and the vote required for proposing an amendment to the states.

It should be noted first that Congress' determination in the above matters may be conclusive on the courts for all purposes.¹⁵⁴ A refusal by the courts to review the constitutional merits of the organizational ground rules imposed by Congress on an article V convention might be defensible on many of the same bases noted earlier in connection with the discussion of judicial review and the application process. Nevertheless, as previously stated, some sound

151. 3 U.S. (3 Dall.) 378 (1798).

152. 2 Farrand, *supra* note 114, at 630.

153. See BRICKFIELD, *supra* note 134, at 18; L. ORFIELD, AMENDING THE FEDERAL CONSTITUTION 43-44 (1942); Black, *supra* note 148, at 959; Note, *supra* note 122, at 1075-76. This continuing hand of Congress in the convention process need not appear unduly strange since article V explicitly gives it the power to decide between modes of ratification regardless of the mode of proposing the amendment to the states. See also Note, *The Constitutional Convention, Its Nature And Powers—And the Amending Procedure*, 1966 UTAH L. REV. 390, 397 n.46.

154. *Coleman v. Miller*, 307 U.S. 433 (1939).

arguments can be made to the contrary. And, even if the courts are conclusively bound, Congress will still be obligated on this subject to follow the Constitution. However, in that case the only available remedy for congressional abuse of this obligation will be political, resting with the electorate at the polls.

Congress would not be justified in modeling an article V convention on the Constitutional Convention of 1787 where representation and voting were by states.¹⁵⁵ Neither the terms of article V nor any past practice under our Constitution requires representation or voting in such a body to be on that basis. Furthermore, in 1787,

[the states] were in a position of at least nominal sovereignty, and were considering whether to unite. The result of the Convention would have bound no dissenting state or its people; the same was true of the acceptance of the new Constitution by the requisite nine. All these conditions are now reversed. We are already in an indissoluble union; there is a whole American people. The question in an amending convention now would be [only] whether innovations, binding on dissenters, were to be offered for ratification.¹⁵⁶

Consequently, the propriety of apportioning voting power and representation by states in the 1787 Convention cannot settle the propriety of similar action in a convention today. The Ervin bill, in its original form, ignored this distinction, providing that "[i]n voting on any question before the convention each State shall have one vote which shall be cast as the majority of the delegates from the State, present at the time, shall agree."¹⁵⁷ The bill, as amended following legislative hearings, more properly provides that each delegate shall have one vote. And, convention delegations under the bill will be weighted by population since "[a] convention called under this Act shall be composed of as many delegates from each State as it is entitled to Senators and Representatives in Congress."¹⁵⁸

Modeling an article V convention on the Convention of 1787 would also have grave deficiencies from the point of view of popular representation in the amending process. Amendments proposed by Congress have been approved by two-thirds of the Senate representing thirty-four states, and two-thirds of the House representing

155. M. FARRAND, *THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES* 57 (1962).

156. Black, *supra* note 148, at 964-65.

157. S. 2307, 90th Cong., 1st Sess. § 9(a) (1967) (original bill); Ervin appx., 66 MICH. L. REV. 896, 900 (1968).

158. S. 2307, 90th Cong., 1st Sess. § 7(a) (1967) (amended bill); Ervin appx., 66 MICH. L. REV. 896, 899 (1968). Members of the House of Representatives must be apportioned on a population basis. U.S. CONST. art. I, § 2.

roughly two-thirds of the nation's population. However, if a contemporary convention were to follow the 1787 model, so that each state would have one vote regardless of its population, "then thirty-four states representing 30 per cent of the population could call the convention, twenty-six states representing one-sixth of the population could propose new amendments, and thirty-eight states representing less than 40 per cent of the population could ratify them."¹⁵⁹ This possibility seems most undesirable. Alterations of our fundamental law should be, within the framework of those procedures expressly provided in the Constitution for amending it, subjected to the greatest degree of popular participation and representation possible. Amendments to our Constitution are, after all, changes of the basic social compact upon which our whole society rests. Every member of our society, therefore, has a very large stake in the amending process which justifies as wide a popular participation as possible.

In any event, Congress would seem barred from apportioning delegates and voting power in an article V convention on a basis which is *less* representative of the popular will than it is. The reapportionment cases¹⁶⁰ tell us that as a general constitutional rule legislative apportionments must be structured according to the principle of "one man-one vote." Although a convention to propose constitutional amendments has no authority to ratify them, it is a vital and essential part of the legislative process. That body should, therefore, be deemed subject to the usual demand that representation in the statute-making process be based on population.¹⁶¹ Presumably, the due process clause of the fifth amendment binds the federal government on this subject in the same way as the states are bound by the equal protection clause of the fourteenth amendment.¹⁶² The only exception, of course, is that on the national level the federal government's obligations in this respect are modified by the Constitution's express provision for equal representation of the states in the Senate and all the ramifications attendant to that particular arrangement.

Due process' insistence that representation in legislative schemes

159. Sorensen, *supra* note 115, at 19, col. 1.

160. *Reynolds v. Sims*, 377 U.S. 533 (1964); *Wesberry v. Sanders*, 376 U.S. 1 (1964).

161. See *Toombs v. Fortson*, 205 F. Supp. 248 (N.D. Ga. 1962), *vacated in part and remanded*, 379 U.S. 621 (1965).

162. Compare *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954), with *Bolling v. Sharpe*, 347 U.S. 497 (1954). See also, e.g., *Harrell v. Tobriner*, 36 U.S.L.W. 2283-84 (D.D.C. Nov. 11, 1967) (holding that the fifth amendment's due process clause imposes equal protection requirements on the United States).

be based solely on population may therefore be subject to an implied exception which would permit Congress to secure symmetry, in apportioning the delegates and voting power of an article V convention, with the alternative body empowered under our fundamental law to propose constitutional amendments. That is, the delegates and voting power might properly be apportioned so that each state would, as the amended Ervin bill provides, have representation equal to its combined number of Senators and Representatives in the Congress. But to be consistent with the demands of due process as interpreted in the light of the reapportionment cases, delegates and voting power could never be apportioned on a *less* popular basis in an article V convention than the representation scheme in Congress. The possible exception to the rule of "one man-one vote" that may be applicable in this situation can be only as broad as the particular scheme of congressional representation written into the Constitution demands.

Sound reasons suggest, however, that the apportionment of delegates and voting power in a national constitutional convention can and should be *more* representative than Congress and be based solely on population. Values inherent in our federal system are adequately protected in the ratification process where each state has one vote. Apportionment of both delegates and voting power solely on the basis of population makes good sense because it would conduce to the most accurate expression of the national will, which ought to be the objective in any such convention. Congress should, therefore, apportion article V convention delegates to the states solely on the basis of population and provide that the vote of each delegate be equally weighted.

In dealing with another important aspect of convention organization the first draft of the Ervin bill provided that "[e]ach delegate shall be elected or appointed in the manner provided by State law," but this was amended to provide that "two delegates shall be elected at large and one delegate shall be elected from each Congressional district in the manner provided by State law."¹⁶³ This is a wise change and happy compromise. The delegates from each state should be elected from districts of equal population, rather than elected at large within that state or appointed by the state legislature. Election by districts tends to assure better representation of the numerous discrete and divergent interests found within each state than election at large. The latter scheme would give all of a state's repre-

163. S. 2307, 90th Cong., 1st Sess. § 7(a) (1967) (amended bill); Ervin appx., 66 MICH. L. REV. 896, 899 (1968).

sentation to the statewide majority interests, completely excluding minority interests even though they may be majorities in some parts of the state. If Congress, by deferring to state law, had permitted some states to elect their delegates to the national convention at-large, and others to elect theirs from single-member districts of equal population, it may also have violated due process by analogy to some of the fourteenth amendment equal protection-reapportionment cases.¹⁶⁴ Certain classes of electors in states selecting all their delegates by statewide at-large elections may be much worse off in terms of convention representation than electors in other states with single-member delegate districts.¹⁶⁵

Moreover, direct election of convention delegates by either method is more desirable than their appointment by the legislature. Since the delegates will have to run on a public platform of some sort if they are to be elected, direct popular selection permits the people to express their views early in the amending process. In addition, because the state legislatures were sufficiently disturbed to request the assemblage of such a body to deal with a certain problem, it may be wise to insulate the selection of the convention's members from their influence. The more independent checks in the amending process, and the greater the number of disassociated groups that consider the problem, the safer and more reliable the result of this most important process is likely to be. And, since the people—not their legislatures—are sovereign, and a constitutional amendment is a modification of the social compact, the convention process should, as far as possible, be an unfiltered expression of the sovereign will.

A third problem area has to do with the degree of convention approval to be required to propose an amendment. Although the initial Ervin draft provided that "a convention called under this Act may propose amendments to the Constitution by a majority of the total votes cast on the question," the amended version provides for "a vote of a majority of the total number of delegates to the convention."¹⁶⁶ This is only a minor improvement. Congress should require a vote of two-thirds of the delegates to propose any given amendment in order to assure a symmetry of concurrence in

164. See *Kruidenier v. McCulloch*, 258 Iowa 1121, 142 N.W.2d 355 (1966) (holding that any scheme of legislative apportionment in which there are multi-member districts and single member districts in the same house is, absent special circumstances, a violation of the fourteenth amendment's equal protection clause and the state constitution's uniform operation of laws clause). But see *Burns v. Richardson*, 384 U.S. 73 (1966) (holding to the contrary under the fourteenth amendment).

165. See *Kruidenier v. McCulloch*, 258 Iowa 1121, 142 N.W.2d 355 (1966).

166. S. 2307, 90th Cong., 1st Sess. § 10(a) (1967) (amended bill); Ervin appx., 66 MICH. L. REV. 896, 900 (1968).

the bodies empowered to propose constitutional amendments—whether the body be Congress or a convention. Such symmetry has a virtue that is greater than token consistency; it would eliminate any possible forum-shopping. A two-thirds requirement in convention would also guarantee that no amendment, regardless of its means of proposal, is ever submitted to the states before an overwhelming consensus as to its desirability is evidenced in a nationally-oriented body.

E. *State and Congressional Authority To Limit the Convention*

If an article V convention is properly convened, can either the states or Congress limit the scope of its authority in any way? It should be recalled that the applications sponsored by Senator Dirksen and the Council of State Governments attempt to restrict the convention to the approval or rejection of the precise amendments contained in those resolutions. Prior discussion has already demonstrated that an article V convention is to be a fully deliberative body empowered to propose those solutions to a problem that *it* deems best. Consequently, the convention cannot be limited by the state applications to the approval or rejection of the text of any particular amendments contained therein. Nor, by the same token, can Congress limit the convention in this manner.¹⁶⁷

Some persons have contended, however, that an article V convention would operate free of any control as to subject matter from outside institutions:

Pandora's Box will be opened wide. For no matter how these state applications are worded, no matter what limitations are given by the Congress on its convention call, there is no possible way by which such a convention can be required to confine itself to reapportionment or any other issue. A national Constitutional Convention, by definition, would represent the highest power in our system. Like its single predecessor in 1787, which had in its day been specifically told by a cautious Congress to confine itself to the "sole and express purpose of revising the Articles of Confederation," this new convention could ignore any instruction, tackle any subject, and propose any amendments or revisions that it sees fit.¹⁶⁸

167. As noted earlier, Brickfield disagrees. BRICKFIELD, *supra* note 134, at 25. There is another reason why Congress cannot properly limit a convention to the approval or rejection of the text of any particular amendment. The framers of the Constitution probably intended the convention method of proposing amendments to be as free as possible from congressional interference so that the convention could propose any amendments *it* deemed desirable in spite of any congressional objections to the provision.

168. Sorensen, *The Quiet Campaign To Rewrite the Constitution*, SAT. REV., July

Implicit in this view is the assumption that an article V convention is a direct and complete expression of the sovereign will; that once it is assembled, such a body is endowed with all the power residing in the people. Consequently, neither the states, the Constitution, nor any agency of the national government can limit it. The delegates to such a convention are, according to this philosophy, "what the people of the state would be if they were congregated here in one mass meeting [They] are the State."¹⁶⁹ So, "[w]hen the people of the United States meet in a constitutional convention there is no power to limit their action. They are greater than the Constitution" ¹⁷⁰

The argument that an article V convention is sovereign and therefore beyond external control is specious. The convention is but a constitutional instrumentality of the people, deriving all its powers from article V. It is no more than a specific means expressly provided for in the Constitution, and governed by its terms, by which the people may revise their fundamental law. "While there may be a special dignity attaching to a convention by reason of its framing fundamental law, no such dignity or power should attach which would invest it with a primacy over [the states or] other branches of government having equally responsible functions [in the amending process.]"¹⁷¹ A constitutional convention is, therefore, distinguishable from an extra-legal or revolutionary convention. A revolutionary convention is an unconstitutional, hence illegitimate body exercising provisionally the functions of government and deriving its powers from revolutionary force and violence or from necessity. Such a convention is possessed of unlimited powers.¹⁷² On the other hand, a constitutional convention is,

as its name implies, *constitutional*; not simply as having for its

15, 1967, at 18. See also 113 CONG. REC. S.5458 (daily ed. April 19, 1967) (remarks of Senator Javits) ("A constitutional convention, even if elected under a congressional mandate that it could deal with only one subject, could run away. After all, it would be a duly created constitutional convention, and it could propose any amendments which it decided it wished to propose, subject to ratification.") 113 CONG. REC. S.5453 (daily ed. April 19, 1967) (remarks of Senator Proxmire) ("And what is to prevent the representatives of the states in convention assembled from deciding to do just about anything they please?"); 113 CONG. REC. S.5454 (daily ed. April 19, 1967) (remarks of Senator Tydings); 113 CONG. REC. S.5462 (daily ed. April 19, 1967) (remarks of Senators Proxmire and Dirksen). For the state legal precedents to this effect, see Note, *The Constitutional Convention, Its Nature and Powers—And the Amending Procedure*, 1966 UTAH L. REV. 390, 402-03.

169. ILLINOIS CONSTITUTIONAL CONVENTION DEBATES 27 (1847).

170. 46 CONG. REC. 2769 (1911) (remarks of Senator Heyburn).

171. AMERICAN ENTERPRISE INSTITUTE, *supra* note 145, at 36.

172. J. JAMESON, THE CONSTITUTIONAL CONVENTION 6, § 7 (1867).

object the framing or amending of Constitutions, but as being within, rather than without, the pale of the fundamental law; as ancillary and subservient and not hostile and paramount to it. This species of Convention sustains an official relation to the state, considered as a political organization. It is charged with a definite, and not a discretionary and indeterminate, function. It always acts under a commission, for a purpose ascertained and limited by law or by custom. Its principal feature, as contradistinguished from the Revolutionary Convention, is, that in every step and moment of its existence, it is subaltern¹⁷³

Article V contemplates a *constitutional* convention, not a revolutionary convention. This must be so since the body is summoned pursuant to the terms and under the authority of that constitutional provision.

Prior discussion should indicate that while neither the states nor Congress may limit an article V convention to consideration of the *terms* of any particular provision, either or both should be able to restrict such a body to the proposal of amendments dealing with the same general subject matter as that contained in the applications. Indeed, the state applications should accomplish this of their own force. The reason for this is that an agreement that a convention ought to be held is required among two-thirds of the state legislatures before Congress is empowered to convene such a body. No article V convention may be called in the absence of such a consensus. If the agreement contemplates a convention dealing only with a certain subject matter, as opposed to constitutional revision generally, then the convention must logically be limited to that subject matter. To permit such a body to propose amendments on any other subject would be to recognize the convention's right to go beyond that specific consensus which is an absolute prerequisite for its creation and legitimate action.

If the state applications, of their own force, can so bind the convention, then Congress must disregard and refuse to transmit for ratification any proposed amendment which concerns a different subject matter. Here, as elsewhere, if the issue is deemed nonjusticiable, the courts will be bound by Congress' decision on the question. This, regardless of whether Congress deems a proposed amendment ineffective because it is beyond the scope of the convention's authority or effective because it is within the scope of the convention's authority. On the other hand, if this question is justiciable,

173. *Id.* at 10, § 11.

the courts may independently determine whether an amendment proposed by such a convention is beyond the general subject matter requested by the state applications. If such an amendment goes beyond the permissible subject matter bounds, the courts might enjoin its ratification or set the amendment aside after ratification because it was never properly proposed.

The view that the states have this authority to limit a convention to the consideration of amendments dealing with the same general subject matter as that contained in their applications is not widely accepted. It has been insisted that "[t]he nature of the right conferred upon the state legislatures in requesting Congress to call a constitutional convention is nothing more or less than the right of petition."¹⁷⁴ In this view, the convention itself is a federal instrumentality set up by Congress under powers granted to it by the Constitution. Since article V directs Congress to call the convention and is silent as to the details of such a body, Congress is the only authority entitled to specify those details. Consequently, if any power can limit such a convention to the proposal of amendments dealing with the same subject matter as that contained in the state applications, it can only be Congress.¹⁷⁵ "[S]tate legislatures . . . have no authority to limit an instrumentality set up under the federal Constitution. . . . [T]he right of the legislatures is confined to applying for a convention, and any statement of purposes in their petitions would be irrelevant as to the scope of powers of the convention."¹⁷⁶

So, even if the state applications cannot themselves perform the task, Congress at least should have the power to restrict the convention to the same general subject matter as that contained in the applications upon which it is predicated.¹⁷⁷ This sort of restriction, in fact, is essential: A convention called pursuant to a resolution dealing with state legislative apportionment, for example, should not be permitted to propose amendments concerning the treaty power or free speech.¹⁷⁸ A constitutional change should never be

174. Wheeler, *Is a Constitutional Convention Impending?*, 21 ILL. L. REV. 782, 795 (1927).

175. STAFF OF HOUSE COMM. ON THE JUDICIARY, 82D CONG., 2D SESS., PROBLEMS RELATING TO STATE APPLICATIONS FOR A CONVENTION TO PROPOSE CONSTITUTIONAL LIMITATIONS OF FEDERAL TAX RATES 15 (Comm. Print 1952).

176. ORFIELD, *supra* note 153, at 45.

177. *Contra*, 46 CONG. REC. 2769 (1911) (remarks of Senator Heyburn). ORFIELD, *supra* note 153, at 45; Wheeler, *supra* note 174, at 796; Note, *Proposing Amendments to the United States Constitution by Convention*, 70 HARV. L. REV. 1067, 1076 (1957).

178. See STAFF OF HOUSE COMM. ON THE JUDICIARY, 82D CONG., 2D SESS., PROBLEMS

proposed by a convention unless two-thirds of the states have previously agreed that a convention to consider an amendment dealing with the particular subject matter involved is desirable (or that a convention is needed to consider a general constitutional revision). For this reason, it would seem anomalous were Congress powerless in this regard. Certainly Congress would be under a duty to call a general convention if two-thirds of the state legislatures properly ask for one. Equally obvious should be its right and obligation to limit the scope of a convention to the subject matter requested by the state applications. As one commentator noted in this regard:

A convention . . . is an instrument of government and acts properly only when it stays within the orbit of its powers. Since the Congress is the branch of the Federal Government which has the duty of calling the convention, and since it acts at the requests of the States, and since both, in the final analysis, represent the people, the ultimate source of all power, a Federal constitutional convention, to act validly, would necessarily have to stay within the designated limits of the congressional act which called it into being.

. . . This does not mean that the convention may not exercise its free will on the substantive matters before it; it means simply that its will shall be exercised within the framework set by the congressional act calling it into being.¹⁷⁹

At least one state application expressly recognized that such a body could not validly propose amendments outside of the general subject matter area specified in the state resolutions and embodied in the congressional resolution making the convention call. Indiana's 1957 application stated:

It is within their . . . [the states'] sovereign power to prescribe whether such convention shall be general or shall be limited to the proposal of a specified amendment or of amendments in a specified field; that the exercise by the sovereign States of their power to require the calling of such convention contemplates that the applications of the several States for such convention shall prescribe the scope thereof . . . and that it is the duty of the Congress to call such convention in conformity therewith; that such convention is without power to transcend, and the delegates to such convention are

RELATING TO STATE APPLICATIONS FOR A CONVENTION TO PROPOSE CONSTITUTIONAL LIMITATIONS OF FEDERAL TAX RATES 15 (Comm. Print 1952); J. JAMESON, A TREATISE ON CONSTITUTIONAL CONVENTIONS; THEIR HISTORY, POWERS AND MODES OF PROCEEDING 10, 11, 493 (4th ed. 1887).

179. BRICKFIELD, *supra* note 134, at 18. See also W. DODD, THE REVISION AND AMENDMENT OF STATE CONSTITUTIONS 93 (1910) (A convention "is bound by all restrictions either expressly or impliedly placed upon its actions by the constitution in force at the time.").

without power to act except within, the limitations and provisions so prescribed.¹⁸⁰

With the exception of the statement regarding the states' right to limit such a convention "to the proposal of a specified amendment," the thesis of the Indiana resolution is identical to that suggested here.

There is at least some judicial authority, by analogy, for the proposition that Congress may limit the scope of an article V convention's deliberations. State courts have on several occasions held that state constitutional conventions are subject to the restrictions contained in the call for the convention. The theory is that the convention call promulgated by the legislature is a law and the delegates are elected under the terms of that law.¹⁸¹ Consequently, they can exercise no powers beyond those conferred by such a statute or the state constitution.

It seems clear, therefore, that Congress at least can limit the scope of any article V convention to the "subject matter" or "problem" at which the state applications were directed. Certainly Congress is morally bound to do so. In any subsequent litigation, the courts should respect such a limitation imposed by Congress and disregard any provisions proposed by a convention beyond its authority. Of course, the notion that the state applications can themselves limit the scope of a convention's authority should not be ignored. If that theory is rejected, however, the people of the United States will have to rely on Congress.

The Ervin bill expressly adopts this approach and seems to be completely sound in this respect. It specifically provides that every delegate to an article V convention must, before taking his seat, "subscribe an oath not to attempt to change or alter any section,

180. C. BRICKFIELD, *supra* note 134, at 25.

181. See *Wells v. Bain*, 75 Pa. 39, 51 (1874); *Staples v. Gilmer*, 183 Va. 613, 33 S.E.2d 49 (1945). In the latter case the court stated at 627, 33 S.E.2d at 55:

Where the legislature, in the performance of its representative function, asks the electors if they desire a convention to amend or revise a certain part of the Constitution but not the whole Constitution, an affirmative vote of the people on such question would have the binding effect of the people themselves limiting the scope of the convention to the very portion of the Constitution suggested to them by the legislature. The wishes of the people are supreme. Some agency must ascertain the desire of the people, and the legislature, by section 197, has been selected by them to do so.

See also *Cummings v. Beeler*, 189 Tenn. 151, 223 S.W.2d 913 (1949); Note, *The Constitutional Convention, Its Nature and Powers—And the Amending Procedure*, 1966 UTAH L. REV. 390, 403-05. But see *Goodrich v. Moore*, 2 Minn. 49, 53 (1858) (dictum). For debate on both sides of this question, see 1 DEBATES OF THE CONVENTION TO AMEND THE CONSTITUTION OF PENNSYLVANIA 1872-73, 52-61 (1873).

clause or article of the Constitution or propose additions thereto except in conformity with the concurrent resolution [of Congress] calling the convention."¹⁸² In addition, it provides that "[n]o convention called under this Act may propose any amendment or amendments of a general nature different from that stated in the concurrent resolution [of Congress] calling the convention."¹⁸³ In summoning the convention, Congress is to "set forth the nature of the amendment or amendments for the consideration of which the convention was called."¹⁸⁴ Furthermore, the product of the convention's work may be disapproved by Congress for submission to the states for ratification "on the ground that its general nature is different from that stated in the concurrent resolution calling the convention."¹⁸⁵

In the end, it seems clear that an article V convention may be limited to the same general subject matter as that contained in the state applications. A runaway convention is no real danger since the power of the states and Congress in this regard is based on a sound legal and practical basis. "[T]ogether, the Congress and the State legislatures . . . not only initiate but also finally approve the work of any convention. With this ultimate power at their commend [*sic*], they may fence off the boundaries of power within which a convention must operate."¹⁸⁶

F. Ratification of Convention-Proposed Amendments

Even if an amendment on the subject of state legislative apportionment could be validly proposed by a convention called pursuant to the resolutions in question here, Congress would not be bound by the resolutions' stipulation that such a proposal be ratified by the *legislatures* of three-fourths of the states. Article V clearly empowers Congress to determine in its sole discretion which of the two modes of ratification specified in that provision shall be utilized;¹⁸⁷ this, regardless of the method of the particular amendment's proposal. Congress could, then, select either mode—"by the Legislatures of

182. S. 2307, 90th Cong., 1st Sess. § 8(a) (1967) (amended bill); Ervin appx., 66 MICH. L. REV. 896, 899 (1968).

183. *Id.* § 10(b).

184. *Id.* § 6(a).

185. *Id.* § 11(b).

186. C. BRICKFIELD, STAFF OF HOUSE COMM. ON THE JUDICIARY, 85TH CONG., 1ST SESS., PROBLEMS RELATING TO A FEDERAL CONSTITUTIONAL CONVENTION 26 (Comm. Print 1957).

187. *United States v. Sprague*, 282 U.S. 716 (1931). See Forkosch, *The Alternative Amending Clause in Article V: Reflections and Suggestions*, 51 MINN. L. REV. 1053, 1078-80 (1967).

three-fourths of the several states, or by Conventions in three-fourths thereof . . .”—and that selection would be immune from alteration by judicial review.

The initial Ervin bill recognized this, providing that Congress specify in its convention call “the manner in which such amendment or amendments [proposed by the convention] shall be ratified in accordance with article V of the Constitution.”¹⁸⁸ This approach, which seems desirable, was inexplicably deleted in the amended version. If Congress does not provide for the ratification mode in the convention call, it might be tempted to refuse to provide for ratification if it disliked the proposal’s terms. This would be improper since the convention means of proposing amendments was intended to be independent of Congress. Indeed, it was meant to provide a route by which amendments could be proposed to the Constitution when the national legislature refused to act. “Therefore, the best time and place to make such a choice [respecting the means by which any convention proposal shall be ratified] is in the call, and thereafter any further congressional function should be extremely and strictly limited to simple procedural duties.”¹⁸⁹

One last point should be noted with respect to the ratification of a proposed amendment dealing with state legislative apportionment. Prior discussion would support the conclusion that malapportioned state legislatures may not properly or validly *ratify* a constitutional amendment legitimizing legislative malapportionment.¹⁹⁰ As noted previously, this conclusion is justified by analogy to the doctrine of “clean hands.” It is also supportable because the reasons of expediency which normally justify recognition of a malapportioned legislature’s acts are outweighed where recognition of its action would cause irreparable and permanent injury to those protected by the present constitutional requirement of one man-one vote.

III. CONCLUSION

The convention route to proposing constitutional amendments is uncharted. Many difficult questions would have to be resolved in any effort to utilize it. Current pressures for such a convention may

188. S. 2307, 90th Cong., 1st Sess. § 6(a) (1967) (original bill); Ervin appx., 66 MICH. L. REV. 896, 898 (1968).

189. Forkosch, *supra* note 187, at 1079. The Ervin Bill, however, imposes the duty on Congress to stop the proposal’s submission to the states if it is outside of the general subject matter submitted to the convention for its consideration. S. 2307, 90th Cong., 1st Sess. § 11(b) (1967) (amended bill). As noted earlier, this seems proper.

190. See text accompanying notes 90-107 *supra*. See also Wolf, *An Antireapportionment Amendment: Can It Be Legally Ratified?*, 52 A.B.A.J. 326 (1966).

induce the settlement of some of these questions but are unlikely to resolve them all. The Ervin approach, which is for Congress to enact a general statute on this subject, seems desirable. However, the bill's provisions should be modified in conformance with the suggestions made here.

In any event, the efforts of the thirty-two states that have tendered petitions to Congress since 1962 for an article V convention seem to be constitutionally inadequate. Congress may call such a body only upon receipt of proper, valid, and timely applications from two-thirds of the states. The petitions from these states are inadequate for present purposes because they do not request the plenary kind of convention which article V contemplates and cannot properly be treated as applications for this kind of convention; most of these applications are now stale; and, anyway, all thirty-two could not be added together as one group because they do not deal with the same subject matter. Even if two more states tender applications for a convention Congress should, therefore, refuse to call such a body on the basis of these state petitions. It seems probable that Congress' decisions on this matter will be given conclusive effect by the courts—either by avoidance as a nonjusticiable “political question,” or on the constitutional grounds ventured herein.